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INTERPRETING THE CONSTITUTION

BY

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Interpreting the Constitution

INTRODUCTORY

First permit me to be so bold as to express what I think should be the object of anyone speaking in this place at the request of your University, the University which is the intellectual child of Mr. Jefferson, the man who stood in his lifetime and still stands as the world's greatest exponent and defender of democracy.

There are two concepts of the prime business of a university in the sphere of the social sciences; one is that the university should teach "sound fundamental principles;" the other, that it should help those who come to it to ascertain pertinent facts and to analyze problems; in short, to teach how to think; not what to think.

Whatever the function of the university in a Fascist or Communistic state, in a democratic country it is to arouse interest in political and social problems, but not to stand for any particular answer to those problems. Democracy needs citizens trained to think for themselves. Its very existence depends on the correctness of the assumption that the citizens will do their own thinking.

If these lectures dealt with all the more important questions of our constitutional law I should call them: "Constitutional Problems and The Federal Constitution" because even in my comparatively narrow field—the mechanics and method of interpreting the Federal Constitution—I hope to deal with the necessity for an official interpreter of a written Constitution, the failure of our Federal Constitution to provide such an interpreter, the development of the Supreme Court as the body to perform the function of interpretation

and its methods of interpretation. I hope to discuss some of the principal problems of constitutional interpretation dealt with by the Supreme Court under the leadership of Chief Justice Marshall and I shall also discuss some of the more important present problems of interpretation the decision of which may affect profoundly our future. But it is no part of my object to state what is and what is not in any given situation the correct interpretation of any clause, even if one assumes there is a correct interpretation. In each instance the object will be to show you the reasonably possible interpretations and the factors which largely influence the members of the Supreme Court when called upon to choose between two or more interpretations each of which can be supported by reasonable arguments. In short, I wish to discuss with you how the Supreme Court became the interpreter of the Constitution and the factors which affect the performance of that function.

Chapter I.

The Lack of Any Provision in the Federal Constitution for Its Authoritative Interpretation—Marbury v. Madison.

Written and Unwritten Constitutions.

The United States is primarily a country of written constitutions. We have forty-nine, the Federal Constitution and one for each State. The English, while they are usually critical of written constitutions, are very proud of their unwritten one.

On a day in May, 1935, I was sitting in one of the little parlors of a hotel in the English Lake country. The other occupant was an Englishman, the head of an important and world wide business. His commercial dealings and his personal acquaintance extended to many countries. He knew the United States and its people almost as well as he did his own. As a good Englishman, he was reading the London Times. The copy before him contained an excellent account of the decision of the Supreme Court holding the National Recovery Act, the NRA, unconstitutional.[1] Putting the paper down, he turned to me and said, "I hope you won't mind my saying that I never fail to thank God that our Constitution is not a written constitution. This National Recovery Act of yours was seriously defective, but some such Act is necessary for both our country and yours if our present economic system is to survive."

I am not at present concerned with the Englishman's economic ideas or his estimate of the value, or rather the curse, of written constitutions. As to the latter he merely reflected the opinion of most of his countrymen. But what did he mean by this unwritten British Constitution? He meant,

though I make no attempt at a precise definition, those principles and rules relating to the structure of government and its relations to persons subject to its jurisdiction recognized as fundamentally important by a majority of those whose opinions are politically effective. He meant what the present Duke of Windsor meant in that masterpiece of English, his revealing broadcast to the British people after his abdication. Take his opening words:

> "At long last I am able to say a few words of my own. I have never wanted to withhold anything, but until now it has not been constitutionally possible for me to speak."
> * * *

And he adds:

> "During these hard days, I have been comforted by Her Majesty, my mother, and by my family. The Ministers of the Crown and in particular Mr. Baldwin, the Prime Minister, have always treated me with full consideration.
>
> "There have never been any constitutional differences between me and them and between me and the Parliament. Bred in the constitutional traditions by my father, I should never have allowed any such issue to arise." [2]

It is significant and should be noted that the rule that the King cannot go directly to his people or even indirectly through Ministers of his own appointing, a rule, the unquestioning obedience to which, coupled with a determination to marry Mrs. Simpson, cost the King his crown, was not always part of the British Constitution. Indeed, in its present form it has been only part of the British Constitution for a little over one hundred years, a comparatively short period in English history. Queen Anne in the first years of the Eighteenth Century could appoint ministers in defiance of the desires of the party just returned triumphant in the elec-

tions. Almost a century later, King George III, by bribery, direct and indirect, saw to it that he had his "King's men" in Parliament carry out his political ideas. And yet today, although it has been alleged that Winston Churchill suggested to Edward a procedure which would have enabled the question of his marriage to come first before Parliament and then before the electorate, all parties in Parliament and the King himself never in the crisis waivered from the principle that the King, even in a matter vital to himself, should not directly or indirectly seek to influence the members of Parliament or the people.

This English Constitution, therefore, is, like the English common law, unwritten, always proceeding on precedent, yet always changing and developing: The common law by the decision of the courts; the British Constitution by the action of Parliament reflecting the considered desires of the majority of the politically effective portion of the British people.

It is often assumed that the United States has no unwritten Constitution. The assumption is incorrect and the cause of much muddled thinking.[3] Today there are at least two important exceptions to the statement that our written Federal Constitution embodies all the principles and rules of our constitutional law: One, that the presidential electors, so elaborately provided for in the Twelfth Amendment, are now no more than cogs in a cumbersome machinery through which the constitutional principle of universal citizen suffrage is applied to the election of President and Vice-President; the other, that in the absence of any written constitutional provision the final authoritative interpreter of our Federal Constitution is the Supreme Court of the United States. In the case of the election of President and Vice-President the unwritten rule prevails over the written provision. There is

no such conflict in the second case because the written Constitution does not contain any provision for its interpretation.

In spite of these important exceptions, once a written Constitution is adopted, there is a tendency to amend it so that it may express all those principles and rules relating to the structure of government and its relations to persons subject to its jurisdiction recognized as fundamentally important. For instance, at the time of the adoption of the Federal Constitution the principle of universal manhood suffrage for all representative and elective offices was not recognized. When, however, during the first part of the Nineteenth Century the adoption of Jeffersonian Democratic principles resulted in the belief that all male citizens should have a right to vote, the very existence of written State Constitutions required their amendment to express the principle. Again, when it was felt by a politically effective majority that women should have all the political privileges of men we expressed that principle in the Seventeenth Amendment to our Federal Constitution.

As to our written Federal Constitution, whatever may be English opinion as to the superiority of unwritten constitutions, few, if any, in the United States desire to abolish it. Indeed, if we are to continue to have a Federal State, a written Federal Constitution delineating the respective powers of the National and State Governments is a necessity. As to the states, we may admit that it is not necessary that any State should have a written Constitution. The idea that each State should have one is due to the fact that the government of the original thirteen states during the colonial period rested on charters from the English Crown or from corporate or individual proprietors. It was, therefore, natural when the colonies became independent that they desired to change their fundamental law, either by adopting new written con-

stitutions or, as in Rhode Island and Connecticut, by adopting written amendments to their colonial charters. There was, therefore, no other thought than that each State should have a written Constitution which would permanently secure the benefits they had won by the sword. No one since has taken the trouble seriously to question their desirability, though there is considerable difference of opinion as to the wisdom of the modern trend to express in the state constitutions detailed provisions concerning judicial organization and local government as well as numerous limitations on the methods of exercising legislative power.

The Convention of 1787; Fundamental Reasons for Its Success.

Our present Federal Constitution is the original document plus twenty-one amendments. As a whole it expresses the way the people of the United States have solved certain constitutional problems as they arose; primarily the way they solved the chief problem confronting the Constitutional Convention of 1787. That problem was to propose a national government capable of dealing effectively with international matters and matters of common domestic concern and at the same time so organized as to satisfy the desire of the people to retain for their state governments very considerable power.[4] The success of the Convention in solving this, their chief problem, was due to many factors, not the least of which was the high average character and ability of its principal members and the confidence the people had in Washington. High character and ability, however, and even the personality and position of Washington would have been of little use if there had not been among the members a general recognition of the nature of their fundamental task and a realization of the vital importance of its accomplishment. So

much has been said and written of the differences of opinion among the members of the Convention and the divergent interests of the large and small states that it is perhaps worth while to emphasize their fundamental agreements. It was due to these agreements that their efforts were successful.

Nearly all the members of the Convention, the representatives of the large as well as those of the smaller states, were united in the desire, while conferring on the central government power to deal with matters of national concern, to leave to the States the power, uncontrolled by the central government, to continue to deal with matters of local concern. Nor was there essential difference among them as to what matters of national concern were: The military and naval forces, treaties and commerce with foreign nations, among the several States and with the Indian tribes. Had there been any real sentiment in favor of having the States retain power over any of these matters, the successful completion of the chief task of the Convention would have become impossible. The differences of opinion which led to the now famous compromises of the Constitutional Convention were differences, not so much born of fear that the Federal government would exercise a given power, but that the States of one section of the country might be able to control the Congress in its exercise.[5]

Again, there was very considerable unanimity of sentiment over another fundamental matter; namely, that the laws of the central government should be administered directly by its agents, not indirectly by commands or requests to the State governments. The Convention adopted without much opposition the principle that the new national government which they planned, unlike the central government under the Articles of Confederation, should have the power to levy taxes and to administer all other national laws through national, not

State officials. Finally, there came to be among the members as the Convention proceeded with its work substantial unanimity in the matter of organization of the executive power; namely, that it should be exercised by one man and that he should not be hampered by that worst of all governmental devices, an executive council capable of overriding his decisions.

Convention's Sins of Commission and Omission.

The Convention did commit two "sins of commission" and two "sins of omission."

The "sins of commission" were the provision for the election of President and Vice-President and the provision relating to amendments. In providing for the election of President and Vice-President the members of the Convention devised a complicated method of indirect election [6] which, had its provisions not been changed by the adoption of the Twelfth Amendment, might easily have produced a critical situation which could not have been dealt with within the Constitution. Indeed, it was only by in this respect happy accident of Hamilton's dislike for Burr that the latter, instead of Jefferson, did not become President in 1801, although Jefferson was the undoubted choice of the great majority of the people.

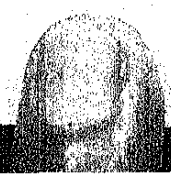
To call the provision adopted for amending the Constitution a "sin of commission" is perhaps unfair to the members of the Convention. True, in a democratic country the persistent will of an effective majority on important matters of policy must, to avoid revolution, be allowed to prevail. The provisions of the Fifth Article relating to amendments are so worded as to prevent the persistent will of the majority of the people of the United States in favor of a proposed

Amendment, especially if the opposition is sectional, being carried out under existing forms of law. It is dangerous because it does not make impossible valid occasions for revolution.

But did the members of the Convention of 1787 regard America as a democracy? Or again, did they regard their task as that of providing a national government for a single country or, on the other hand, as that of providing a strong but not legally indestructible Federation of States? As to the first of these questions, they certainly did not regard America as a democracy in our sense of the term; as to the second, constitutional historians have always differed and doubtless will continue to differ.

It is, I submit, a substantially correct statement to say that with few exceptions the members of the Convention desired a government by those having a conservative background because of their economic position or, as it is sometimes expressed, they desired a "government by the wise, the good and the rich;" even though we may doubt that Hamilton, the most constructive conservative member, however much he may have admired the then English Constitution, really wanted to establish a hereditary monarchy in America.

The members of the Convention were concerned primarily with the creation of a strong national government, not in the protection of the individual citizen from oppression. Had this not been the case, they would never have made the first of their two "sins of omission" by failing to provide for the protection of the individual from the arbitrary exercise of Federal governmental power. Fortunately, the gravity of the possible consequence of this omission was generally perceived when the new Constitution was submitted to the several states. The Constitution would not have been adopted but for the understanding that the first Congress of the new



government would propose amendments to protect the liberties of the individual. This understanding was faithfully carried out, with the result, that while the Constitution as it left the Convention had no "bill of rights," these rights were embodied in the first nine Amendments. These, together with the Tenth Amendment, were proposed by the first Congress and adopted by the necessary number of States by 1791.[7]

The other "sin of omission" committed by the Convention and the one with the results of which we are here primarily concerned was the failure to indicate the body having the power to decide finally disputed questions of constitutional interpretation.

Possible Reasons for Convention's Omission to Indicate the Body Having the Power to Decide Finally Disputed Questions of Constitutional Law.

Many reasons have been advanced for this omission, but no valid excuse. The matter was vital and they neglected it. It was vital because the Constitution creates a Federal State; it confers some powers on the Federal government and leaves the other powers of government to the states. There is in the Constitution properly no attempt to designate specific exercises of the powers conferred or reserved. The members of the Convention must have known that many disputes would arise as to whether a particular alleged exercise of a power by the Federal government or by the states was constitutional and that the recognition of an authoritative arbiter of such disputes was essential to the stability of the new government. Nevertheless, the Convention did nothing.

This inaction is to me one of the enigmas of our constitutional history. We have evidence that many, perhaps the majority of the members of the Convention, thought that the

courts, and particularly the Supreme Court, should decide disputed constitutional questions.[8] If so, why did they hesitate specifically to say so? Others thought the Congress, the members of which would be sworn to obey the Constitution, should decide such questions. But again, if they so thought, why did they not seriously urge a specific statement to that effect? As to those who may have thought that Congress and the States might each decide for themselves the constitutionality of their respective acts, why did not they, if they really believed their theory to be workable, try to embody this condition of hopeless confusion in the written document?

Personally, I do not believe that many of the leading members of the Convention failed to perceive the necessity for the existence of a body empowered to determine disputes involving the interpretation of the Federal Constitution and its effect on State action even though none may have realized the frequency with which such disputes would later arise and the difficulties they would present.

There is one explanation of this failure by the Convention to act that I submit with diffidence. It is that there existed among the leaders the fear that, should the matter be seriously argued in the Convention with an insistence on a definitive decision, the Constitution's adoption by the Convention or its adoption by the people of the several States would be jeopardized because it would create a long wrangle over who should be the final interpreter, the Congress, the Supreme Court, or some body especially created for that purpose. Perhaps also there was the belief that if nothing were said the Supreme Court or the Congress would become the ultimate arbitrator, either of these solutions being satisfactory to the more federal-minded members. If there is anything in the fear which I have postulated, we can excuse their "sin of omission" and turn to events which have embodied in our

unwritten Constitution the rule that the authoritative interpreter of the written Constitution is the Supreme Court.

The Supreme Court's Decision in the Case of Marbury v. Madison.

The first step toward incorporating in our unwritten Constitution the rule that the Supreme Court is the authoritative interpreter of the written Constitution was the decision of that Court in *Marbury v. Madison.*[9] I shall not attempt to give a detailed history of the case, but, because of their dramatic interest, an outline of the main events connected with it is perhaps warranted, especially as a knowledge of the political background of the case is necessary in weighing the force of the Court's reasoning as set forth in the opinion of John Marshall and the criticisms that have been made both of him and the decision.

The presidential election in the fall of 1800 was one of extraordinary bitterness. The triumph of the Republican-Democratic Party and the resulting election of Jefferson by the House of Representatives dealt a blow to the Federal Party, which had up to that time been dominant in the government, from which the Party never recovered. The new President was to take office on the 4th of the following March and the Congress, all the members of which, except some of the Senators, were elected in the fall of 1800, could not convene before that date. Until then the Congress, the members of which with the same exception were elected in the fall of 1798, and the outgoing President could legally continue to function. With the sure prospect of losing after March 4th the control of both legislative and executive departments of the government, the Federalists, in the short time left to them, did everything in their power to entrench themselves in the Judicial Department. On February 13,

1801,[10] the expiring Congress passed an act re-organizing the Federal Judiciary and placing at the disposal of the retiring President, John Adams, the appointment of a number of new Federal Judges. These appointments, in view of the constitutional provision that Federal Judges should hold office during good behavior without diminution of their salaries,[11] were intended to be appointments for life at the salaries then provided by law. On February 27, the same Congress passed an act[12] giving the President about to retire the power to appoint any number of persons he saw fit to be Justices of the Peace in the District of Columbia which at that time included land, not only on the east bank, but also land on the west bank of the Potomac on which stands the City of Alexandria. Almost to the last hour he was in office, Adams was busy filling the new judicial offices created by these acts. On the 4th of March, the work was almost done. All the new judges had been commissioned and forty-two persons had been appointed and confirmed by the Senate as Justices of the Peace for the District of Columbia. A number of the paper rolls or commissions, however, setting forth the respective appointments and confirmations of these magistrates were on the desk of John Marshall who, at that time, was both Secretary of State and Chief Justice of the Supreme Court of the United States. On the report of some disturbances in Alexandria twelve commissions were given to James Marshall to deliver to the respective appointees. James Marshall was a Judge of the United States Circuit Court for the District of Columbia and brother of the Chief Justice. He delivered only eight and the next morning James Madison, Jefferson's newly appointed Secretary of State, found the undelivered ones, together with a large number of other commissions for magistrates, on the desk that John Marshall had vacated. Jefferson directed Madison to

deliver twenty-five of these commissions. Among those withheld was the commission of Marbury.[13]

This action on the part of Jefferson raised a nice legal question which can be stated thus: Is an appointment to office complete when the Senate confirms the President's appointee or is it not complete until the document embodying the commission signed by the President is delivered to the appointee? Jefferson and Madison took the position that the appointment was not complete until the document was delivered. Marbury and three associates who had not received their commissions as Justices of the Peace said that the confirmation of the Senate completed the appointment. Doubtless, most of the members of the defeated Federalist Party sympathized with them, while all the members of the new Republican-Democratic Party of Jefferson believed that this refusal to allow Madison to deliver the commissions was justified; showing that then, as now, differences in the interpretation of the language of constitution or statutes are sometimes due to differences in political interests and theories.

According to Mr. Marbury and his three associates, Madison, in refusing to deliver the documents setting forth that they were appointed Justices of the Peace in the District of Columbia, had refused to perform a ministerial duty as a public officer. When a public officer refuses to do a ministerial act which by law he should do, the person whom his refusal adversely affects has a right to apply to the proper court for a writ or court order directing the officer to perform his legal duty. This writ is called a Writ of Mandamus. The person who is aggrieved must, however, apply to "a proper court;" that is, to a court which has been vested by law with the power to issue such writs. At the time, the Judiciary Act, passed by Congress in 1789, expressly gave to the Supreme Court the right to issue a Writ of Mandamus

on the application of any person "in cases warranted by the principles and usages of law." [14] So Marbury and his associates, Charles Lee, Adams' Attorney General, acting as their counsel, applied to the Supreme Court at its December 1801 term for such writ.

Under the act of 1789 the Supreme Court held two terms, one in February and the other in August. On February 13, 1801, the expiring Federal Congress in reorganizing the Federal Judiciary substituted a June and December term.[15] When the Supreme Court adjourned at the end of its 1801 December term the motion of Marbury and his associates was pending with the expectation that it would be argued at the following June term. However, on April 29, 1802, the Republican-Democratic controlled Congress restored the original terms of the Supreme Court, but omitted to provide for any term in August 1802 with the result that the Court found itself adjourned until the February term of 1803.[16] At that session, the Court, in an opinion written by the Chief Justice, decided the case.

In the first part of his opinion Marshall held that the appointments of the Justices were complete when the Senate confirmed them; that Madison, in withholding the commissions, was acting contrary to law and that an act of Congress designated the Supreme Court as the proper court to issue a mandamus in such a case. Doubtless, many of those in the court room who listened to the Chief Justice read the opinion thought that he had come to the end; but the opinion did not end there. Marshall added: "If this Court is not authorized to issue a writ of mandamus it must be because the law is unconstitutional, and therefore, absolutely incapable of conferring the authority and assigning the duties which its words purport to confer and assign." [17] He then proceeded to point out the fact that the Third Article of the Constitution,

which deals with Federal judicial power, provides for a Supreme Court and such other courts as Congress shall from time to time ordain and establish; that the Second Section of the Article provides that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction;" but that "in all other * * * cases * * * the Supreme Court shall have appellate jurisdiction * * * under such regulations as the Congress shall make." Referring to these provisions, Marshall said that it was clear the Act conferring original jurisdiction on the Supreme Court to issue Writs of Mandamus to public officers purported to confer original jurisdiction on the Court in cases where the Constitution prohibits such original jurisdiction. In view of that fact, the Court held that the Act of Congress was of no binding effect on the Supreme Court or anybody else and, therefore, Marshall, speaking for the Court, dismissed the application for the Writ of Mandamus.

The plaintiffs, though the Court declared them clearly entitled to office, were told that the Supreme Court could give them no remedy. As it is doubtful whether the lower Federal courts at that time had jurisdiction to issue writs of mandamus in such cases, it is not clear that they had any remedy elsewhere.[18]

Criticisms of Marshall and His Opinion in Marbury v. Madison Examined.

The criticisms of Marshall and his opinion are:

1. Marshall should not have taken part in the decision because of his connection with the facts out of which the controversy grew.

2. The Court should have refused to consider the case because it was moot.
3. The Court's opinion should have been confined to the question of jurisdiction.
4. The decision that the Court under the Constitution had the power and duty to ignore an Act of Congress which they considered contrary to the Constitution was unwarranted.

As to the objection that Marshall in taking part in the decision violated judicial ethics, I shall have to admit that today we should expect a judge connected as Marshall was with the facts out of which the case arose to refuse to take part in its decision. Nevertheless, I think we properly may forgive him for the lapse, if lapse it was.[19] He was a party leader of front rank only recently appointed to a judicial office and the sense of judicial propriety was not as keen then as it has become. Furthermore, he was a statesman with sufficient vision to see in the case an opportunity to place his court in a position which he doubtless considered vital to the interests of his country.

The second objection and one often made to the decision is that the Supreme Court should have refused to consider the matter because it had become a "moot case"; for it is an accepted rule that the power of the Federal Courts extends only to the decision of litigation presenting actual controversies.[20] Where no actual controversy ever existed and the parties under pretense of a dispute seek to obtain what is in effect an advisory opinion of the Court the case is moot. A moot case may also arise where a controversy has ended under such circumstances that its decision will not affect the rights or other interests of the parties. If the case of *Marbury v. Madison* was in any degree moot it is because the con-

troversy had ended—not because there never was a controversy. It cannot be denied that a controversy existed at the time when Marbury requested and was refused his commission. As nothing of any legal significance occurred prior to his application to the Supreme Court, it must also be conceded that the case was not moot at the time of such application. But before the February Term of 1803 in which the case was argued, the Republican-Democrats, apparently as an afterthought to their repeal of the Federalist revision of the Judiciary Act,[21] abolished the right of the Justices of the Peace for the District of Columbia to receive fees for their services.[22] As the case thus stood when the argument was heard, Marbury was seeking to establish his right to an office for the performance of the duties of which no compensation was provided. Nevertheless, although the value of the office was thus greatly diminished, the office, and the controversy as to the right to the office, continued to exist. While Marbury would have been somewhat of an honorary dignitary had the Supreme Court issued the writ and Marbury received the commission, he would still have been entitled to exercise the rights and privileges appurtenant to the office, other than the collection of fees for his services, and would also have been in a position to petition Congress to compensate him for his efforts. If the office sought was in existence and Marbury was entitled thereto, the withholding of his commission presented an "actual controversy" and relief could not have been properly denied him by a court of competent jurisdiction.

The third criticism is that the opinion should have been confined to the question of jurisdiction. Contemporary criticism of the case was directed not at the Court's promulgation of the doctrine of judicial review of the constitutionality of an act of the Congress, but at the lengths to which Mar-

shall went in sustaining the right of Marbury to obtain his commission withheld by the Secretary of State only to conclude that relief could not be granted because the Court had no power to issue the Writ of Mandamus.[23] As the Court held that it was not competent to issue the writ, Marshall's discussion of Marbury's right to the office was contrary to the rule that a court should first determine its own competency to decide an issue before expressing an opinion on its merits. However, as an excuse for Marshall's first sustaining the case upon its merits and then rejecting it upon a question of jurisdiction, it may be urged that, admitting the rule referred to exists in all ordinary cases, it is sometimes "honored in the breach" where the controversy between the parties presents an issue on which an authoritative pronouncement of a court is of great public importance.[24] Undoubtedly, whether the delivery of the commission was a condition precedent to the right of an appointee to his office was such a question.

The last and most important criticism is that the Court erred in deciding that it had the power and duty to ignore an Act of Congress which a majority of the judges consider contrary to the Constitution. This criticism is based on the view that, in the absence of any provision in the Constitution, the Congress and not the judges of the Court which Congress itself had organized should have the sole right to determine the constitutionality of its Acts. Marshall's opinion is based on his oath to uphold, preserve and defend the Constitution as the supreme law of the land. He believed that this made it obligatory on him to disregard the Act if he believed it to be contrary to the Constitution. Personally, I do not see how he could have taken any other position than he did. In saying this I do not mean to assert that no reasonable man could come to a different conclusion. On the contrary, I think the

whole question as to whether the judges of the Federal courts should or should not acquiesce in an opinion of Congress as to its powers is one of those which would necessarily be answered, the Constitution itself failing to make any specific provision, in accordance with the life experiences and reactions of the person called on to answer it. Thus, when I say that Marshall could not have given any other opinion than he did I mean Marshall in view of his history.

As stated, Marshall was a leading member of the Federalist Party. As such, he was certainly far from holding the democratic opinions of Jefferson. He may have had a better opinion of members of legislatures than Jay or Hamilton, but his confidence in them was limited and such as it was had probably been weakened by the triumph of the Republican-Democrats at the then recent elections. As a party man he realized that the judiciary was still a Federalist stronghold. All these things made it inevitable that he should have reacted against any suggestion that the Congress or any legislative body had the right to determine finally any question of its power under a written Constitution. Furthermore, while he does not in his opinion mention any prior case involving the right of a court to disregard an act which it thought contrary to the Constitution, he could not have been unaware of the existence of judicial precedent and dicta to that effect.[25] Furthermore, these judicial utterances coincided with the opinions of a majority of those members of the Convention of 1787 who had expressed their opinion on the matter.[26]

Personally, I am doubtful if the possibility of the interpretation by the Congress of its powers being binding on the judicial branch of the government was ever seriously considered by Marshall. There certainly was no large body of public opinion taking this view. Indeed, one of the significant facts concerning the case is the fact that the importance

of the decision that a court could disregard the provisions of an Act of the Congress which it thought to be contrary to the Constitution did not excite at the time any general comment.

Marshall's opinion expresses his convictions with great force and clarity. Like all his opinions, it reveals his character. He was in the best sense of those words a courteous, gentle and modest man, but his modesty was not the reflection of weakness and uncertainty. He had no doubt as to the correctness of his conclusions or the soundness of the arguments which he put forth to support them. His opinions have carried compelling weight primarily because, written in direct and clear language, they manifest the strength of a supremely able man himself untroubled by doubts. All this, however, does not mean that had someone with Marshall's power of persuasive statement taken the position that the Congress was the authoritative interpreter of the Constitution a strong case could not have been made for its support; whether equally strong, it is impossible to say. Such arguments have no comparative scales to determine their relative weight.

Marshall had stated that the Court was bound by the provisions of the Constitution rather than the provisions of the Act of Congress. It could have been pointed out that this statement ignored the real issue, which was not whether the Constitution was the supreme law of the land, but whether Congress or the Supreme Court was the body to interpret the Constitution. At the time, this fundamental issue was obscured by the wording of the Third Article of the Constitution, which in specific language confers original jurisdiction on the Supreme Court in certain cases and in all other cases appellate jurisdiction. The act conferring power to issue writs of mandamus on the supreme court apparently violated

this specific wording. The fact that the Court thus appeared clearly right and the Congress clearly wrong tended to conceal the great constitutional importance of the Court's assumption of the power to determine for itself the meaning of a constitutional provision.

In support of the contention that the Congress is the ultimate interpreter of the Constitution and, therefore, that all Acts of Congress are in legal theory necessarily constitutional, it could have been said that the Constitution established a republican form of government; that in all other then past or present republican governments ultimate power is vested in the elected representatives of the people; that being not mere agents, but representatives, the Congress speaks not for, but as the people; that through the peculiar organization of the Senate the Congress also speaks not for, but as the States; that although members of Congress were bound by the provisions of the Constitution just as the people who elected them were bound, that does not weaken the argument that the authoritative interpretation of the Constitution must rest on the one body that represents all the people and all the States.

Furthermore, in reply to the contention that the members of the Supreme Court by virtue of their oaths to "support the Constitution" could not give effect to an Act of the Congress which they believed to be contrary to the Constitution, it could have been contended that this argument proved too much; that not only members of the Supreme Court but members of the Congress and all executive officers were by their oaths bound "to support the Constitution". If therefore the members of the Court were legally bound to follow the Constitution as they understood it, the President and other executive officers were equally legally bound to disre-

gard the Court's interpretation if they believed such interpretation to be unsound and thus inextricable confusion would result.

In pointing out as I have these possible criticisms of the doctrine of *Marbury v. Madison* that the Court had the power to determine the constitutionality of an Act of the Congress, I do not desire to convey the idea that I believe this doctrine to be wrong. Personally, I do not think that the adjectives "wrong" and "right" are applicable. The important thing to understand is that Marshall with his background and life experiences, faced with these possible alternatives, could do no other than decide as he did. To the people of the United States the important question raised by the decision was whether the Supreme Court, starting with this decision, would in time become the recognized authoritative interpreter of the Constitution.

Chapter II.

History of the Acceptance of the Supreme Court as the Authoritative Interpreter of the Constitution.

Acceptance by the Parties to Litigation; by Federal, Executive and Judicial Officers and by Members of the Congress.

The Supreme Court of the United States in the case of *Marbury v. Madison* decided that in any case properly presented to it it is its duty to regard as inoperative the provisions of an Act of the Congress which the majority of the judges taking part in the decision believe in conflict with the provisions of the Federal Constitution. The Supreme Court's conclusion that an Act of the Congress which the Court regards as unauthorized by the Constitution is inoperative is, of course, for any purpose connected with the dispute out of which the litigation arises, binding on private persons parties to the litigation. But is it to the same extent binding on a Federal public officer party defendant? For instance, if in the litigation between Marbury and Madison the Supreme Court had taken jurisdiction upon the ground that the Act conferring upon it the power to issue the writ was constitutional, would Madison and the President have had the legal privilege of ignoring the Court's writ if they thought the Act conferring such jurisdiction was unconstitutional? Both Madison and the President, like the judges, had taken oaths to support the Constitution. Is the Constitution which the executive officer swears to uphold the Constitution as he understands it or the Constitution as the Supreme Court interprets it? This question was not decided by the case. It is not difficult to see its great importance. Where such a con-

flict of opinion exists, either the view of the Constitution taken by the Court or the view of the Constitution taken by the executive officer with the approval of the President must prevail, at least in all normal cases, or the orderly conduct of public affairs would become impossible.

Although this question was not involved in the decision of *Marbury v. Madison,* Federal executive officers who were parties defendant to litigation subsequent to that decision have obeyed the orders of the Court, in the absence of an order of the President not to do so, irrespective of their own ideas of the correctness of the Court's interpretation of the applicable constitutional provisions. This practice, because of its universality, has developed into a rule of our unwritten Constitution.

It will be noted that the rule as worded admits the possibility of an exception to the rule where the President specifically commands the officer not to obey the Court's order.

The exception is important but there is only one period in our history when a President has exercised this power. This occurred during the War between the States. President Lincoln suspended the writ of habeas corpus in certain parts of the country including Maryland. General Cadwalader, a Federal officer in charge of Fort McHenry, had in his custody one John Merryman of Baltimore. Chief Justice Taney, believing the suspension of the writ to be beyond the President's powers, and acting as a Judge, not of the Supreme, but of the Circuit Court for the District of Maryland, issued a writ of habeas corpus [27] directing General Cadwalader to bring Merryman into court in order that the legality of his arrest might be determined. The officer so directed disobeyed the writ upon the ground that he had been ordered by the President to disregard it. The attempt of Taney to attach the officer for contempt failed and Lincoln, in spite of the opin-

ion sent him by Taney [28] condemning the suspension of the writ of habeas corpus, continued to suspend it.[29]

Lincoln took the position that in a matter which he as President regarded as of vital moment to the preservation of the nation he would follow his own and not the Court's interpretation of the Constitution. Whether he violated the then unwritten Constitution or whether he acted within an exception implicit in the rule is an academic question. His action was an incident of a civil war more serious than any international war in which the country had till then been engaged. The otherwise constant acquiescence of our Presidents in orders of the Court affecting the actions of Federal executive officers enables us to say that a President who today ordered a subordinate Federal officer to refuse to obey an order of the Supreme Court, except in a case where the President considers the very life of the nation involved, would break a now settled rule of our unwritten Constitution. Under this rule the orders of the Court are binding on him.

In this connection it should be pointed out that any subordinate executive is liable to be made a party defendant in a civil or criminal case. It has however been a rule of our unwritten Constitution that the chief executive officer of the nation, the Commander-in-Chief of its armed forces, is not subject to civil or criminal process. He cannot be sued or even subpoenaed as a witness. In this connection it is interesting to note that Chief Justice Marshall, as presiding judge in the trial of Aaron Burr for treason, violated this principle by issuing a subpoena to President Jefferson, ordering him to appear in court as a witness. Jefferson ignored the writ, accompanying his action with a statement which has ever since been regarded as correctly setting forth the reasons underlying the rule that the President as chief executive is not subject to any court order.[30] This, however,

does not interfere with the general subordination of the views of the executive to the Court's interpretation of the Constitution.[31]

When we consider in what sense, if any, our unwritten Constitution makes the decision of the Supreme Court that an Act of the Congress is inoperative binding on others than the parties to the case we come to matters where some of the principles emerging from practice are not so clearly marked. Of course, it is true that the interpretation of the Constitution by the Supreme Court, as any other legal rule enunciated by that Court pertinent to the decision in which the rule was stated, is binding, until modified by the Supreme Court, on all judges of other Federal courts. On the other hand, is it binding on members of the Congress? In this matter there always have been and still are differences of opinion. It can be pointed out that the members also have taken an oath to support the Constitution of the United States. Personally, were I a member of Congress, I would regard myself as having the duty to support the Constitution as I understood it, not necessarily as the Supreme Court interpreted it, though, of course, my opinion might and generally would be influenced by the decisions of the Court.[32] Nevertheless, whatever the opinions of the members of the Congress on the soundness of the Court's reasoning in its opinion accompanying its decision declaring an Act of Congress unconstitutional, the uselessness, unless there is reasonable ground to suppose that the Court has changed its previously announced opinion, of any further attempt to enforce the Act declared unconstitutional or to enact another substantially identical is clear.[33] The attempt to enforce the law or a practically identical law would be met by suits against the enforcing officers. As in the former suit, the government would be defeated and, if necessary, court orders would be

issued which, on the unwritten constitutional principles just stated, all executive officers would obey. As a consequence, unless they believe the Court may change its opinion, members of the Congress do not waste their time in trying to continue to enforce the disapproved Act or in adopting another act clearly within the Court's statement of the constitutional prohibition.

I have said that this acquiescence in the Court's interpretation of the Constitution is a matter of common sense. It is more than that. It is the expression of respect for judicial tribunals that is one of our most valuable characteristics. A contest with the Court arising out of congressional attempts to enact and Federal executive attempts to enforce acts which the Court believes to be unconstitutional is fortunately against the instincts of most of us.

There is one class of Federal officials whom we have not considered: that is, the members of the Supreme Court themselves. Are they bound by the prior decisions of their own Court? Is a dissenting judge bound thereafter to regard the constitutional interpretation of the majority as sacrosanct? Is the judge appointed since the decision bound so to regard it? The practice of the members of the Court generally, though not without exception, follows the principle that each judge has sworn to uphold the Constitution as he understands it, not as the prior decisions of the Court have interpreted it. This I believe is the opinion of most lawyers. It is my own opinion. If correct, it means that by a change in the personnel of the Court, or, even without such change in personnel, by a change in the opinion of one or more of the judges, an earlier interpretation of the Constitution may be changed in a later case by the deliberate action of the Court itself.

However, even though we may believe that a Judge of the

Supreme Court is bound by his oath to interpret the Constitution as he understands it, the instinct to follow precedent tends to make him apply the principles of earlier decisions. Nevertheless, the more important the question before the Court, the less strong is this tendency. Take, for instance, the decisions in respect to the constitutionality of the Legal Tender Acts,[34] a matter of great importance. A change in the personnel of the Court reversed a decision holding unconstitutional the Act making issues of paper money legal tender for the payment of pre-existing debts.[35] Again, another change in the personnel of the Court may lead to a reversal of the 5 to 4 decision holding the first National Child Labor Act [36] unconstitutional on the ground that the power over interstate commerce did not give the Congress power to prohibit the transportation between the States of goods produced in a manner regarded by Congress as inimical to public welfare and unfair to the producers of similar goods in the State into which they were being introduced; a decision perhaps more important, in view of its implications regarding the limitation of Federal power, than any other constitutional case decided by the Court in modern times.

So far we have confined ourselves to a summary of the history of the acquiescence of the parties to the litigation and the different departments of the Federal government in the Supreme Court's interpretation of the Constitution. We have seen that such acquiescence soon became the settled practice. On the other hand the acquiescence of the executive, legislative and judicial departments of the State governments in the interpretation of the Constitution became general only after long opposition. When such interpretation affected the Legislative power of the States and the legality of the acts of their executive and judicial officers the opposition was persistent and vociferous. Nevertheless, it was essential to

the existence of our Federal system that the State governments, their legislative, executive and judicial officers, should accept as the authoritative interpreter of the Constitution the same body which the several branches of the National government accepted. If confusion would result from the Congress or the President persisting in their or his own interpretation of the Constitution in disregard of a conflicting interpretation by the Supreme Court, far greater confusion, a confusion sure to sow the seeds of civil war, would result from the refusal by the legislatures, executive officers and courts of the several States to admit the conclusive character of the Supreme Court's interpretation.

Resistance to and Final Acceptance by the States.

A combination of self interest and pride in their remaining sovereignty made the States reluctant to accept the restraint upon the furthering of their local interests which the Federal system, through the agency of the Federal courts, imposed upon them. While the lower Federal courts had declared a number of State statutes to be unconstitutional during the first decade of our national life,[37] opposition to the Federal judiciary by the States began with the decline of the Federalists. Prior to the death of Marshall this opposition had expressed itself in various forms ranging from mere protest to the refusal to recognize a judgment rendered by the Supreme Court in the exercise of its appellate jurisdiction over State courts of last resort.[38] In two instances opposition to the Supreme Court went so far as to cause the execution of a person convicted of crime although a writ of error from the Supreme Court to review the conviction was still pending.[39]

Unlike the case of the constitutionality of Federal statutes, the question of a Federal review of State statutes and de-

cisions presented not merely the problem of whether the judiciary, as contrasted with the legislative or executive branches of government, should have the final word in such matters, but the further question as to whether State statutes and decisions should be subjected to any review by any branch of the Federal government.

Article VI of the Constitution provides: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

The express provision that the Judges of the States shall be bound by the Constitution and laws made in pursuance thereof "anything in the Constitution or laws of any State to the contrary notwithstanding" does not apply to non-judicial officers. However, there is implicit in the declaration of the supremacy of the Constitution and laws made in pursuance thereof a duty upon all persons, including State legislative and executive officers, to respect that supremacy. Nevertheless, the Constitution failed, not only to provide for an authoritative interpreter of the effect of its provisions in limiting state action, but also failed to provide for any sanction by which the duty of the State judges, executive officers and legislatures to respect that supremacy could be enforced.

The First Congress of the United States in enacting the Judiciary Act of 1789 sought to remedy these defects by providing in the 25th Section of the Act for the review by the Supreme Court of any decision of a State court of last resort adverse to any right claimed under the Federal Constitution, treaties or laws.[40] To those who were not willing to read into the Constitution any authority for a review of State de-

cisions this provision was an unauthorized invasion of State rights and the appellate jurisdiction thus conferred soon became a focal point of opposition to Federal supremacy.

The constitutionality of the 25th Section of the Judiciary Act did not come before the Supreme Court until 1816. Prior to that time, however, the Court had in two cases, *Fletcher v. Peck,* decided in 1810,[41] and *Fairfax's Devisee v. Hunter's Lessee,* decided in 1813,[42] declared State statutes void as conflicting with the Constitution and with Federal treaties. The action of the Court in *Fletcher v. Peck* met with strong opposition. In 1795 the Legislature of Georgia, induced by fraud and bribery, had made large grants of land to several investment companies. Public indignation at these transactions rose to such a pitch that the next session of the Georgia Legislature in 1796 revoked the grants made by the preceding session. After thirteen years of controversy in the courts, the Congress and the press the matter came before the Supreme Court. Marshall, in holding the revocatory Act of 1796 to be unconstitutional as an impairment of the obligation of the contract created by the grants of 1795, upheld the power of the Supreme Court to invalidate State laws which it found to violate the provisions of the Constitution.

The challenge to the authority of the Supreme Court under the 25th Section of the Judiciary Act to review decisions of State courts adverse to an alleged Federal right was answered by Story in *Martin v. Hunter's Lessee* (1816).[43] The Court had held in 1813, in the case of *Fairfax's Devisee v. Hunter's Lessee,* that the Act of Virginia confiscating the Virginia estates of Lord Fairfax was unconstitutional because in conflict with a treaty between the United States and England providing that the property of British subjects in the United States should be immune from State confiscation acts passed during the Revolution. The Virginia Court of Appeals re-

fused to recognize the mandate of the Supreme Court to enter judgment for the holder of the Fairfax title on the ground that the appellate jurisdiction of the Supreme Court did not extend to a review of the decisions of State courts of last resort and that Section Twenty-five of the Judiciary Act was unconstitutional in attempting to confer such jurisdiction.[44] *Martin v. Hunter's Lessee* arose upon a writ of error sued out to review this action of the Virginia Court. On this review Justice Story upheld the power of the Congress to confer upon the Court the right to review decisions of State courts adverse to rights arising under the Federal Constitution, statutes and treaties.

Five years later this position was reaffirmed by Marshall in *Cohens v. Virginia*.[45] One Cohens had been convicted of selling lottery tickets in Virginia in violation of State law. Claiming the authorization of a Federal statute for his acts, a review by the Supreme Court of his conviction was sought by writ of error. In spite of the objection of the Virginia Legislature that the Supreme Court had "no rightful authority under the Constitution to examine and correct the judgment," [46] the Supreme Court exercised jurisdiction and redeclared the constitutionality of the 25th section of the Judiciary Act and its power to review the decisions of State courts.[47]

The existence of such power in some one final arbiter was essential to the preservation of uniformity and order in the Federal system; indeed, to the very existence of the Federal system itself.

While these decisions of Story and Marshall announced the principle of the supremacy of the Federal judiciary over State action, the principle was far from being generally accepted. Though at no time was there united opposition by

the States, numerous protests were made by individual States which considered that the Court's application of the principle adversely affected their local interests.

Even during the chief justiceship of Marshall the principles of Federal supremacy were again challenged. The State of Georgia, pursuant to a plan to reclaim lands within the State occupied by Indian tribes, began the enforcement of its penal laws within such territory in spite of the fact that relations with such tribes were the subject of Federal treaties. One Corn Tassel, a Cherokee, having murdered another Indian within the Cherokee tribal territory in Georgia, was convicted under a Georgian statute. A writ of error from the Supreme Court of the United States to review this conviction was ignored and Corn Tassel executed.[48]

Certain missionaries were later convicted in the Georgia Superior Court for failure to comply with an "anti-Cherokee" statute requiring all white persons living within the Indian territory to procure a State license and take an oath of allegiance to the State. The Federal writ of error to review their conviction was ignored. The Supreme Court, however, proceeded with the case. The Court, after holding the Georgia statute unconstitutional as interfering with the Federal control by treaty of the Indian tribes, ordered the Georgia Superior Court to release the missionaries.[49] This mandate was ignored and the missionaries were released only after the Governor of Georgia was persuaded to grant them pardons.[50]

Federal authority was again defied by Georgia when, as in the case of Corn Tassel, one John Graves convicted of murder by a Georgia court was executed in spite of the pendency of a writ of error from the Supreme Court to review the decision; the State Legislature and the Gover-

nor joining in a condemnation of the effort of the Supreme Court to exercise appellate jurisdiction over State criminal courts.[51]

In the decade preceding the Civil War, the authority of the Supreme Court to act as the final judge of the distribution of power within the Federal system was again denied. The most severe challenge of this period came from Wisconsin as the sequel of the arrest in 1854 of Sherman M. Booth, an abolitionist editor, for alleged violations of the Federal Fugitive Slave Act. Booth obtained a release from Federal custody by means of a State-issued writ of habeas corpus. The issuance of this writ was sustained by the Wisconsin Supreme Court upon the ground that the Fugitive Slave Act under which the arrest had been made was unconstitutional.[52] A writ of error from the Supreme Court was obtained by the Federal Marshal to review this decision. The Wisconsin Supreme Court complied with this writ by certifying the record in the case to the Supreme Court. Before the case was argued in that Court, Booth was tried in the United States District Court for a violation of the Federal statute and convicted. But when he was released upon a second State writ of habeas corpus, the State Supreme Court refused to recognize a second writ of error from the United States Supreme Court to review the issuance of the new habeas corpus writ.

The Supreme Court, in spite of such defiance, proceeded to decide both cases, sustained the constitutionality of the Fugitive Slave Act, and redeclared the inability of a State court to place itself beyond the reach of Federal review.[53] The Wisconsin Supreme Court, by an evenly divided vote, refused to grant permission to file with its clerk the mandate of the United States Supreme Court in these cases[54] while the State Legislature adopted a resolution asserting the power

of the individual States to act as the ultimate judges in the interpretation of the Constitution as to the extent of the Federal powers.[55] Unlike earlier controversies between the Supreme Court and the States, the litigation relating to Booth involved the constitutionality of Federal action and not State action. The controversy, however, like those which preceded, turned upon whether the view as to the distribution of power within the Federal system which was entertained by the Supreme Court should prevail over a conflicting view asserted by a State court.[56]

These sporadic but insistent denials of the authority of the Supreme Court to conclusively determine the extent of the Federal powers show that there was by no means the same general acceptance on the part of the States of the authority of the Court as the final interpreter of the Constitution as had from an early date been shown by the Federal legislative and executive officers. Nevertheless, the failure of States which had no interest at stake to join in the opposition to the Supreme Court's exercise of authority indicates that the principle of the supremacy of that Court over State action was becoming a part of our unwritten Constitution.[57]

The Civil War in making impossible the maintenance of a State-asserted right antagonistic to Federal authority put an end to State opposition to the power claimed for the Supreme Court by Marshall and Story.[58] With the ever-broadening interpretation of the Fourteenth Amendment, itself a product of that War, the scope and the importance of the Federal review of State laws and decisions have correspondingly increased.[59]

With the general acceptance of the Supreme Court as the authoritative interpreter of the Constitution in disputes between the National and State governments, the process begun by the decision of *Marbury v. Madison* was complete. That

case decided merely that the Court would apply to any litigation before it the provisions of the Constitution as the majority of the Court understood them. The history of the process by which the Court's interpretation of the Constitution is now acquiesced in by all other public officers, National and State, as well as by the great body of our citizens makes that case perhaps the most important ever decided.

The principle that the Supreme Court is the authoritative interpreter of our written Constitution is an outstanding characteristic of our system of government. Although not found in any provision of our written Constitution, the people have made it a part of the unwritten Constitution of the United States.

Chapter III.

Characteristics of the Supreme Court and Their Effect on the Efficiency with Which It Discharges Its Function as the Interpreter of the Constitution.

What is the character of that tribunal which is the authoritative interpreter of disputed provisions of the Constitution? The most important fact is that the tribunal is a court. This is a matter of historical as well as present importance for if the Congress were not to be the final interpreter of the extent of its own powers, the only tribunal in the first part of the Nineteenth Century that commanded sufficient confidence to be recognized as the authoritative interpreter of the Constitution was a court. The courts of the English speaking peoples, even before the War for Independence, had come to hold in the minds of the citizens a position of authority as bodies independent of the executive and the legislature. They derived from this independence a position of respect and confidence. It is true that this respect and confidence was seriously impaired in this country at the time of the decision in *Marbury v. Madison* by the partisanship of many of the Judges, members of the Federal party. Nevertheless, the Supreme Court when Marshall became Chief Justice, in spite of the fact that it had done little, was in a position of authority which no body not a court could hope to attain.

As a court, the only function of the Supreme Court is the consideration and disposition of litigated cases. It can only consider the question of the constitutionality of an Act of Congress or an Act of a State legislature if the determination of the question will affect the legal interest of the parties to a litigation which the Court is competent to decide.[60] Thus,

when the Court construes the Constitution it does so only because the Judges believe a construction is necessary to a settlement according to law of the respective claims of the parties to a real, not fictitious, suit. No one, not even the Congress or the President, can require the Court to pass on the constitutionality of an existing or a proposed Act. As long ago as 1793 when President Washington submitted to the Court questions relating to international law and the interpretation of treaties the Court declined to answer the questions on the ground that in replying to it they would be exercising a power which was not a judicial power and that judicial power alone had been conferred on them by the Constitution.[61]

Being a Court and nothing more, it is natural, though the Federal Constitution is silent as to the qualification of the Court's members, that the Judges are always lawyers. No President has ever appointed, or, I believe, thought of appointing a student of American constitutional history or a political scientist. Such a person might be valuable as an interpreter of the Constitution, but he would be perhaps worse than useless in the decision of those matters essential to the disposition of a case which had nothing to do with the interpretation of the Constitution. The great majority of the cases coming before the Court are cases involving the interpretation of statutes or the application of the common law and not raising any constitutional question.

The very fact that the Supreme Court is a court having much important business not connected with the decision of constitutional questions has naturally emphasized the importance of appointing as Judges men of high standing among the members of the legal profession, which means that they shall be men of legal learning and experience. It has not been, and is not even now, generally recognized that they shall be men of any special knowledge of constitutional questions

although their general attitude toward public questions as a forecast of how they will approach questions of constitutional interpretation has always been an element in their selection. Furthermore, as it has only been within recent years that those who have devoted themselves exclusively to the study and teaching of law have begun to be regarded as a distinct and important branch of the profession, no member of the Court as yet owes his appointment to his eminence as a student or teacher of law alone. In short, the Court is now and always has been composed of men who before their appointment were eminent practitioners or judges of other courts originally selected from the practicing bar.

The members of the Supreme Court are not only lawyers, they are lawyers trained in the common law system of developing and expressing law. The common law system of jurisprudence prevails in all but one of the States of the United States and in nearly all of the member States of the Commonwealth of Free Nations known as the British Empire. Under the common law system judges are so trained that they instinctively emphasize precedent in deciding the law applicable to the instant case; that is, the case before the court. The rule that judicial precedent controls the decision in the instant case means that the rule of law applied in a case shall be applied in subsequent cases presenting facts so far similar that the court sees no ground on which a distinction should be made. As far as I am aware there never has been in any State where the common law system of jurisprudence prevails a statute or an attempt to adopt a statute requiring a court to follow in a subsequent case presenting similar or even identical facts the rule of law enunciated in a prior decision. Nevertheless, judges consider themselves normally bound to apply to the case before them an applicable rule of law stated in an earlier case by

their court or by a higher court in the same jurisdiction, even though they may have more than considerable doubt as to the correctness of the rule of law as an original proposition. This following of precedent is the factor which has enabled our courts to build up our common law—that is, the law that is not expressed in statutes—and it has also enabled the courts in construing a statute to express rules of interpretation which will be followed in subsequent decisions.

The emphasis on precedent in our common law system of stating law does not prevent the courts from developing law by grafting exceptions on the rules of earlier decisions. Every common law judge carries in what we may call the "back part of his head" the thought that normally in deciding the law applicable to a case he will follow earlier decisions in prior cases, unless he feels that the instant case presents a combination of facts which in the interest of justice requires him to modify the previous rule. Indeed, sometimes these exceptions modifying a previous rule are so much more frequently applied than the rule itself that the rule tends to, and finally does, disappear. In thus developing the common law the courts normally, if not invariably, mould it to the needs of life, though sometimes the process of adjustment is too slow and remedial legislation reflects the desire for speedier adjustment. In the interpretation of written constitutions or statutes the same moulding process tends to take place especially where the provisions are expressed in general terms. Thus, in the Constitution the provision of the Fifth Amendment that "no person shall * * * be deprived of life, liberty or property, without due process" is closely analogous to what it would be if this due process clause were a common law rule which some court had first stated in a case decided long ago. On the

other hand, such provisions as those for the election of President and Vice-President in the Twelfth Amendment give no such latitude of construction. Even the rule in the First Article that "No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken;" that is, shall be apportioned among the several states in accordance with their population,[62] though open to considerable dispute as to what are direct taxes, leaves little leeway for modifying an interpretation once made short of reversing it. Thus, the decision that an income tax was a direct tax within the meaning of the Constitution, though believed by many students of taxation to be wrong, required a constitutional amendment to be adopted before the Congress could provide for such a tax.[63]

Perhaps as a common law lawyer I am prejudiced, but I believe that the principal factor which tends to increase the Court's efficiency as an interpreter of the Constitution lies in the fact that its members are trained in our common law system of stating and developing law.

The beneficial aspects of this system are that it tends to

(a) restrain, when any question of constitutional interpretation arises, the statement of a rule wider than that called for by the question presented by the facts of the case;
(b) maintain not an absolute, but a reasonable certainty in interpretation;
(c) adapt the written provision where latitude of interpretation is possible to changing conditions.

As to the first statement there is, of course, more than one instance where the Supreme Court in stating a rule has gone beyond the necessities of the case before it. Furthermore,

I am not sure that the same beneficial tendency would not exist if the interpreting tribunal were a court but not a court trained in our common law system of stating and developing law. Be that as it may, our judges are trained to endeavor to confine the rule of law stated in their opinions to the facts of the case. Experience teaches that any attempt to state in one case wider rules of construction than necessary for the decision may and often does lead later, when a case is presented within the rule as stated, to the Court's being in the unfortunate position of either reversing the rule or making a regrettable decision.

From the explanation already given of our common law system of stating and expressing law it results that the construction necessary for the decision of a case once made is adhered to in subsequent cases presenting facts substantially similar to the first case. This adherence to precedent produces a consistency of interpretation. A high degree of consistency in constitutional law, as in other law, is a good thing. It is essential to the very existence of law itself; essential also to the existence of a government of law and not of men.

Of course, I do not wish to be understood that an interpretation of the Constitution once made should in every case be adhered to by the successors on the Court of the men who made it. I have already stated my opinion that a judge's oath to support the Constitution requires him to interpret it as he, and not other judges past or present, understands it. There may and do sometimes arise cases in which it can be shown that a rule applied in an earlier case is both wrong and disastrous in its results. In such situations the announced earlier rule should unhesitatingly be reversed. Nevertheless, the influence that prior decisions will inevitably have on men trained in our common law system of

stating and developing law will be greater as a general rule than on the non-lawyer and this greater influence tends under normal conditions to produce a desirable certainty.

A desirable degree of certainty in the law is not, however, the only advantage of the training in the common law system received by the American and English lawyer. Our common law, as has been already pointed out, is capable of development and this development tends to make it accord with the needs of life. While in connection with the interpretation of a written provision, whether in constitution or statute, the interpreting body has less opportunity to develop the law, what we may call "interpretative law" is, as is our common law, inevitably subject to the same developing process.

Let us now turn to other characteristics of the Supreme Court. Its Judges with rare exceptions are not only lawyers trained in the common law system of stating and developing law, they are today, as already pointed out, all men who before their appointment were eminent practitioners or judges of other courts originally selected as judges from the practicing bar.

Lawyers, being human beings, are not exempt from the rule that our opinions on any reasonably disputable question, including questions of constitutional interpretation, are influenced—I do not say controlled—by our life's experiences. An American practicing lawyer may have for his clients men of all sorts and conditions, but the able and successful practitioner tends to be employed by those of large property and extensive business. It is legal business coming from this class that normally absorbs much of the time and thought of leading members of the American bar.

Such a statement could not truthfully be made of the English barrister. At least, it would require modification. In

England, they retain the separation of the class of solicitors to whom the client goes and the barrister class, the members of which are selected by the solicitors to conduct in court the litigated cases. The barrister under the English practice is retained for a definite case. Such a thing as an "annual retainer" is not known. In the United States, on the other hand, the lawyer or the firm of which he is a member carries on all legal services including legal advice, the drawing of legal papers and litigation. Furthermore, a corporation or a rich person may, and usually does, pay the lawyer an "annual retainer;" that is, makes an arrangement with him which secures his services in advance on any matter on which the client may consult him. As the terms of such arrangements are frequently for a year, they have come to be known as "annual retainers." It is the large annual retainers that make it possible for the lawyer to carry the expense considered necessary to perform for important clients many and varied services with efficiency.

It is not necessarily a criticism of our system of legal professional organization to say that the leading members of the practicing bar in the United States are probably more thoroughly imbued with the public importance of their client's interests and more influenced by the attitude of their clients toward current business, political and social questions, than are the leading barristers at the English bar. Whether this is correct or not, it is unquestionably the fact that the leading lawyers of America, taken as a class, represent the dominant opinions of those engaged in large business or in one way or another owning or controlling considerable amounts of property.

In view of the immense influence of the Court as the interpreter of our Constitution on the course of public events and the destinies of the United States, the fact that the life

experiences of those who compose the Court make them more familiar with that class in the community which is predominantly conservative has an element of danger. In times of economic change the Constitution, when doubtful questions of interpretation arise, may be given a construction which overemphasizes the reactions of what are known as the "business interests." Where these interests coincide with the best interests of the country as a whole, good results; if they do not, harm. An ideal court would be one in which the life experiences of its members would, taken as a whole, cause the court to reflect the interests of the whole country rather than those of any class or section. Such an ideal can be only striven for and approached; never attained.

The exercise by the Supreme Court of the function of authoritative interpreter of the Constitution has its advantages and its dangers. Whether the former outweigh the latter or whether the Congress or some other body, especially created for the purpose, would perform this necessary function better, I leave you to judge. Defects necessarily inhere in every governmental institution. I have referred to what may be regarded as dangers in the Supreme Court's exercise of this important function, not only because I want you to see all the pertinent facts but because to minimize its dangers, it is first necessary to recognize that they exist. If we should ever take away from the Court its function of interpreter of the Constitution, let us hope it will be because we have found or invented a body better fitted to perform it and not as the result of popular discontent with results which, if the dangers had been realized, could have been largely avoided.

Chapter IV.

Characteristics of Interpretation Problems.

Wide Possible Divergence of Interpretation.

The Constitution has as its purpose the definition of the powers of the Nation and of the several States. As in the case of any organic act, this could only be properly done in general terms. For the Framers to have attempted to foresee and expressly provide for every situation which might thereafter arise would have been folly. It would have doomed their work to an early death. New conditions would have inevitably arisen to outmode its provisions. The generality of its terms makes possible a longer life for the Constitution because new situations can be effectively dealt with without constant changes in the text. Often in performing its function of interpreter of the Constitution the Supreme Court, because of the general terms in which many of the most important provisions of the Constitution are expressed, is not constrained to reach any particular conclusion; rather it has the possibility of a choice of several different interpretations which, though widely divergent, may each be supported by reasonable argument. This greatly increases the importance of the function of authoritative interpretation and, therefore, of the body exercising that function. Its decisions often have and doubtless will often again profoundly affect our national welfare.

Extent to Which Social Background and Political Philosophy Affects the Choice of Possible Interpretations.

I have already pointed out that when there exists reasonable differences in interpretation of a clause in the Consti-

tution each of us in exercising our judgment as to the interpretation which should prevail is influenced, though not necessarily controlled, by the experiences of our lives. The extent to which the social background and political philosophy of a judge affects the choice he makes of possible interpretations is nowhere more clearly shown than in many of the greatest of Marshall's decisions. The approval accorded these decisions by later generations has caused them to be regarded as the inevitable result of any fair reading of the Constitution. The fact has become obscured that the views of Marshall which time has proven best for the national progress were neither the views of the majority of the Nation during the period of their adoption by the Court, nor the only rational views which could be entertained. As already pointed out, Marshall was a Federalist and at the time of his appointment to the bench a leading member of the Federalist Party. He was a statesman and a party politician. These two qualities are not incompatible. Perhaps one cannot be a statesman, if we define "statesman" as one who guides wisely his country's immediate actions, if he is not also a politician. As a leading Federalist, Marshall's life since the successful termination of the Revolution had brought him into social and working contact with the richer and conservative classes; his political views were their views; he was a friend and admirer of Hamilton; he disliked Jefferson; he lived among and was one of those who believed in a strong national government. He wanted the Federal Government to be as strong as any reasonable interpretation of the Constitution could make it. Yet, practically during the entire period of his Chief Justiceship the dominant popular sentiment of the country increasingly laid emphasis on democracy and State rights.

Marshall—I say Marshall because his was the influence

that dominated the Court—was called upon to decide several cases involving doubtful questions of constitutional interpretation of great public importance. In practically all of these cases he interpreted the Constitution in a manner to support National and limit State power. Two examples will suffice: The case of *M'Culloch v. Maryland,*[64] decided in 1819, and the case of *Gibbons v. Ogden,* decided in 1824.[65]

Marshall's Decision in M'Culloch v. Maryland.

In 1791, Congress incorporated the Bank of the United States.[66] Its charter expired in 1811 and was not renewed. The economic needs arising out of the War of 1812 brought about the incorporation of a second Bank of the United States in 1816.[67] A branch of this bank was established in Baltimore. In 1818, the Legislature of Maryland passed a law taxing "all Banks, or branches thereof, in the State of Maryland not chartered by the legislature."[68] The Act provided that if any bank had or should establish any branch in the State without the authority of the Legislature, it could only issue notes of certain denominations, the notes to be printed on stamped paper furnished by the State; the tax for the stamps ranging from ten cents for a five dollar note to twenty dollars for a thousand dollar note. The legislation was the result of the popular agitation against the Bank of the United States, and was designed to prevent its doing business in the State. The Bank's directors claimed that the legislation was unconstitutional. M'Culloch, the Cashier of the Baltimore branch, refused to pay the tax, and as a result, was sued for violation of the Act. Judgment was given against the cashier in the State courts and the case was appealed to the Supreme Court of the United States. There the decision of the Maryland Court of Appeals was unanimously reversed.

Ever since Hamilton, in Washington's first administration, had advocated the establishment of a Bank of the United States the constitutional power of the Federal government to do so had been a matter of controversy. The controversy involved conflicting theories of constitutional construction so mixed with conflicting opinions as to the wisdom of the establishment of such a bank that the two questions were not easily severable in the public mind. The monied interests generally supported the bank as an aid to the promotion and stability of business; other classes disapproved of it on the ground that such a bank would be operated in favor of the richer classes as well as hurt State banks which were more likely to be under the control of those engaged in small business enterprises.

In analyzing the constitutional question presented by the case the Preamble, the First Article and the Tenth Amendment should be considered.

The Preamble declares that, "We, the people" "ordain and establish" the Constitution to provide, among other things, for "the common defense" and to "promote the general welfare." It is an important question whether this Preamble gives to the Federal Government any power not found in the body of the Constitution or whether it merely aids, by setting forth the objects of the Constitution, its construction in doubtful cases.

The First Article declares that the Congress shall have certain powers which are specifically enumerated. None of these enumerated powers state that the Congress shall have the power to establish a bank or refer in any way to banks; but, after enumerating the "powers" conferred on the Congress, the Article provides that the Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all

other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." [69]

The Tenth Amendment, adopted in 1791, provides "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Bank as established by Congress had two functions: the first, profit for its shareholders by lending money and otherwise carrying on a banking business; the second, to provide fiscal or banking facilities for the Federal government. The Court in interpreting the Constitution to determine whether the Congress had the power to create such an institution was faced with at least four theories upon three of which the constitutionality of the Bank could be sustained. The Court could have held that

(1) The Preamble to the Constitution confers on Congress the power to do anything which it considers promotes the general welfare.

(2) As the Constitution establishes a National Government, an act of Congress may be justified by showing that the power to pass it naturally adheres in a National Government.

(3) Any act is within the power of Congress if it is an appropriate choice of means to carry out any of the powers specifically conferred on the Congress or other powers vested in the National Government or in any department or officer thereof.

(4) The Congress can pass only those acts which are affirmatively shown to be indispensably necessary to the exercise of a power specifically granted.

Marshall ignored the Preamble as an independent source of authority and in the following well-known passage repudiated the second and fourth while adopting the third possible interpretation:

> "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." [70]

The specific powers on which Marshall upheld the constitutionality of the legislation establishing the Bank were the power to lay and collect taxes; to borrow money; to regulate foreign and interstate commerce; to declare and conduct a war and to raise and support armies. He believed that all these powers, especially those for collecting and expending revenue, required the transportation of treasure and that the banking corporation established by the Act of Congress was an appropriate means for this purpose.[71]

The majority of us today may sympathize with Marshall in his construction of the words "necessary and proper for carrying into execution the foregoing powers" as equivalent, in view of the fact that it is a National government of which the Constitution speaks, to "appropriate to carry into execution the foregoing powers." However, in view of Marshall's admission that our Federal government is one of

enumerated powers, the decision is an example of a broad interpretation of what is an "appropriate means."

The case, in view of its facts, stands for two propositions:

(1) The Federal government has a right to incorporate a National Bank whose shares are held by private persons.

(2) A State government cannot impose a tax on the operations in the State of such a bank which it does not impose on State banks.

The second proposition is narrower than Marshall expressed it. The tax was imposed only on banks not incorporated by the State. His opinion, ignoring as it does the fact that the Act discriminated between the United States Bank and Maryland State banks, shows that he would have held unconstitutional any tax on the operations of the Bank in the State whether discriminatory or not. This broader rule has since been adopted by the Supreme Court in holding Federal instrumentalities to be immune from State taxation.[72]

Marshall's Decision in Gibbons v. Ogden.

The case of *Gibbons v. Ogden,* decided in 1824, deals with the extent and nature of the Federal power over commerce.[73] The Constitution confers on Congress the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." [74] As early as 1789, Congress by a series of Acts began the regulation and licensing of those engaged in the coastal trade.[75] Subsequently, by special acts, the Legislature of the State of New York granted to Robert R. Livingston and Robert Fulton, the exclusive right to navigate, with vessels propelled by steam, all waters within the jurisdiction of the State.[76] The

grantees assigned this franchise to John R. Livingston, who in turn assigned to Aaron Ogden the right to navigate the waters of the State in boats passing from New Jersey to New York. One Gibbons procured two vessels propelled by steam called the "Stoudlinger" and "Bellona;" had them registered under the Act of Congress of 1793 [77] and proceeded to run them between Elizabethtown, New Jersey, and New York City, in defiance of the exclusive privilege claimed by Ogden. Ogden applied to Chancellor Kent for a perpetual injunction. Gibbons asserted that the exclusive privilege granted by the State Legislature was contrary to the Constitution and laws of the United States. Kent, disregarding this defense, granted the injunction.[78] His decree was affirmed by the highest court of the State,[79] and Gibbons appealed to the Supreme Court of the United States, where the decision was reversed by a unanimous court, though Mr. Justice Johnson wrote a separate opinion.[80]

The case involved several questions. Did the word "commerce" in the grant of power over that subject in the Constitution, include navigation? Admitting that it did, had the States, in the absence of Congressional legislation, a power to regulate foreign and interstate commerce? If the States retained a concurrent power over interstate commerce until Congress had acted, did the legislation of New York, as applied to boats licensed under the Act of Congress, conflict with that Act?

The first of these questions was of vital importance. The word "commerce," like most words in common use describing classes of acts or things, is used with different shades of meaning. When we speak of the commerce between two countries, if we use the word "commerce" in its broadest sense, we intend to include nearly all forms of intercourse

between their respective inhabitants; whether that intercourse takes the form of the exchange of goods, letters or telegrams, or the passage of persons from one country to the other by trains or boats. The character of the transactions, as, for instance, whether the boats come or go for the pleasure or for the profit of their owners, is immaterial. Again, we may use the word "commerce" intending thereby to indicate all intercourse between the citizens of the two countries undertaken for profit, thus including not only the exchange of goods, but the act of carrying goods or passengers for hire between the two countries but excluding all non-profit transactions. Or we may mean to include all acts which relate to buying, selling and transporting goods, but to exclude the idea of the transportation of passengers. Again, we may intend to designate the business of buying and selling, but not the business of transporting either goods or passengers; as when we speak of "commerce and navigation," thus using the word "commerce" to distinguish the business of the merchant from the business of the carrier by water.[81]

The counsel for Ogden contended that in construing the extent of the power granted to Congress, the word "commerce" should be so read as to exclude the idea of navigation. The fact that one of the prime motives for the adoption of the Constitution had been the desire to free commerce from destructive regulation by the States furnished an argument against this contention and in favor of holding navigation to be within the Federal protection of interstate commerce. Marshall was in thorough sympathy with this result. To him the expression "commerce between the States" covered all commercial intercourse. " 'Commerce' undoubtedly is traffic" he said; "but it is something more; it is intercourse. It describes the commercial intercourse

between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." [82]

The second question presented in *Gibbons v. Ogden* was whether the States had the power, in the absence of congressional legislation, to regulate foreign and domestic commerce. It was not necessary for the Court to decide this because the Court held that the Federal Act of 1793, licensing vessels desiring to engage in the coastwide trade, was an exercise of the power with which the Act of the State of New York, granting exclusive privileges to navigate waters within the jurisdiction of the State in vessels propelled by steam, conflicted. Marshall seems to have assumed, however, that a power given to Congress in the Constitution deprives a State from exercising that power even in the absence of Congressional legislation. Later decisions have established this rule of construction though, like most rules, time has shown the necessity, if not for exceptions, at least for explanations of its meaning which show the limitations of it application.[83]

As stated, these two cases show that the life experiences of a member of the Supreme Court influence his interpretation of the Constitution. I have dealt with them at some length, not only for this, but also for other reasons. In the first place, I wish to illustrate the truth of the assertion that the Court in interpreting important clauses in the Constitution may be confronted with a choice of several reasonably possible interpretations. Again, I wish to show how momentous may be the affect on our national life of the particular interpretation adopted. Thus, in *M'Culloch v. Maryland,* though the decision that the Federal government had no power to charter a bank would not have had serious consequences, for the Court to have held, as it well might, that the means adopted by Congress to carry out a power ex-

pressly conferred must be indispensably necessary to the execution of the power would have tended to paralyze the operations of the Federal government. Such a decision would have been a public calamity because at that time a rule limiting the government in its choice of means to execute a power expressly conferred could not, in view of the then public sentiment, have been cured by the adoption of an amendment. Again we perceive the importance of the "broad" interpretation of "commerce" made in *Gibbons v. Ogden.* If interpreted to exclude navigation or the business of carriage by water, modern regulation of interstate railways—the carriers by land—would be impossible. Yet we tend to forget as we read Marshall's opinion in the case that another and much narrower view of "commerce" than that taken by the great master of impelling statement was not only possible but capable of being supported by an argument which to many would have been conclusive.

Finally, both cases illustrate the fact that though the Court in Marshall's time tended to reflect the opinions on business, social and political questions of the richer and more conservative classes, this did not necessarily mean that its decisions were not for the best interests of the nation. A believer in democratic government does not have to maintain the thesis that the majority are always right.

Taney's Decision in Dred Scott v. Sandford.

There is one other case, *Dred Scott v. Sandford,* decided in 1857, to which I wish to refer.[84] It does not concern a presently applicable interpretation of the Constitution; but, besides its great historical interest, it is a notable illustration of the manner in which the experiences of the judges and the public and political opinions of the period may affect the decision of a given case. In 1820, Missouri was

admitted as a slave State, but in the Act by which the State was admitted it was provided that slavery should be forever prohibited in that part of the Louisiana Territory lying north of north latitude of 36° 30′. This Act is known as the Missouri Compromise Act.[85]

Dred Scott, a negro slave belonging to Doctor Emerson, a surgeon in the United States Army, was taken by his master, in 1834, from the slave state of Missouri to Rock Island in Illinois, where slavery was prohibited by the State constitution,[86] and in 1836, to Fort Snelling on the west bank of the Mississippi in Louisiana Territory where slavery was prohibited by the Missouri Compromise. In the latter year, with the consent of his master, Dred Scott married and one of his two children was born in the free portion of the Louisiana Territory, the younger being born in Missouri, a slave State, after Doctor Emerson returned with his slaves to that State in 1838.

In 1847, after the death of Doctor Emerson, Dred Scott brought suit in the Missouri Circuit Court to gain his freedom, upon the theory that his residence in the free territory had emancipated him. A judgment in Dred Scott's favor was reversed by the Missouri Supreme Court upon the ground that his status of a slave was resumed upon his return to the slave State of Missouri, regardless of what status he possessed outside of the State.[87]

The widow of Doctor Emerson, apparently desiring a determination by a Federal Court of the status of Scott, conveyed him and his family to her brother, John F. A. Sandford, of New York, in order to create the requisite diversity of citizenship for a suit in the Federal courts. An action in trespass was then begun by Dred Scott against Sandford in 1853 in the United States Circuit Court for the District of Missouri. A plea in abatement to the jurisdiction of the

court on the ground that Dred Scott, free or not, was not a citizen within Article III Section 2 of the Constitution conferring jurisdiction on the Federal Courts in cases "between citizens of different States" and therefore lacked capacity to sue was overruled. The court then proceeded to decide the case on the merits and denied Dred Scott's claim to freedom. A writ of error was taken to the Supreme Court of the United States where, after two arguments in 1856, the majority of the Justices agreed among themselves that their decision should be confined to a reversal of the lower court upon the point of jurisdiction. Had this agreement been carried out the case would have determined only Scott's incapacity to sue in the Federal Courts, leaving undetermined both his status as a slave and the constitutionality of the Missouri Compromise Act.

The fact that the dissenting justices intended to discuss the Missouri Compromise Act in their decisions and the arguments of Justice Wayne finally persuaded a majority of the Court to review that Act. The opinion of the Court, as written by Chief Justice Taney, first passes upon the question:

> "Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, privileges and immunities, guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution." [88]

It is to be noted that this did not require a determination as to whether Dred Scott was free or not, since the only objection considered to his capacity to sue was that he was a descendant of one who was an African slave. Taney reached the conclusion that Dred Scott lacked capacity to sue and that

the lower court was therefore without jurisdiction. This was sufficient ground for reversal of the lower court's judgment, but Taney then considered whether Scott was free or a slave. He could have been held free on either of two grounds. One was that his master had at one period become a resident of the free State of Illinois; that during that period Scott was with him, and this sojourn made Scott free; the fact of his return to a slave State not operating to restore his status as a slave. Taney held that Scott's sojourn under these circumstances in Illinois did not change his status as a slave and therefore, upon his return with his master to a slave State his master could exercise all his rights as such.[89]

The second ground was that the presence of Dred Scott in the United States territory declared free by the Missouri Compromise Act had permanently destroyed his slave status. The Act provided that "Slavery shall be forever prohibited" in the northern part of Louisiana Territory. This language is, of course, open to the interpretation that it only prohibited the creation of the status of slavery and the enforcement by a master of the duties incident to such status while slave and master were in the free territory. Such a construction would have made Scott's sojourn in the Territory of no more effect on his slave status when he returned to a slave state than his sojourn in the free State of Illinois. The Act was, however, also open to the construction that the prohibition of slavery in the Territory was intended to work a permanent liberation of any slave brought within the Territory. Taney gave the Act this latter construction contended for by Scott's counsel. The construction would have made Scott a free man if the Act had been within the power of Congress to adopt. Taney held it unconstitutional.

The conduct of the Court in passing upon a constitutional question which was not necessary to the disposition of the

case was undoubtedly irregular. Nevertheless, the country in general regarded the true question presented by the case to be the constitutionality of the Act. Ever since the adoption of the Kansas-Nebraska Act of 1854[90] the extent of congressional control over slavery within the territories had been a matter of bitter controversy. Although some regarded the issue as a "political question" of which the Court could not take cognizance, the great part of the people who had any opinion upon the matter looked forward to a determination of this question by the Court. It was in the belief that their opinion would be a final answer that the majority of the Court passed unnecessarily upon that question. The high pitch of public sentiment and the need for a definitive answer which could guide future congressional action furnished justification for such action. Had the Court decided the *Dred Scott* case upon the question of jurisdiction it is almost certain that it would have been condemned for avoiding what was regarded by the general popular and professional mind as the real issue.[91]

The extent of the power of Congress over the territories presented a difficult question of constitutional construction. On the one hand, it could be construed that the Federal government as a National government had a control limited only by the first Nine Amendments.[92] On the other hand, there is the argument that since the Federal government held the Territories as trustee for all the people of all the States, and since the Constitution recognized the institution of slavery, the citizens of the slave States had the right, not only to go to any part of the Territories, but so going, to take with them their property, goods, cattle and slaves and to receive there for all their property including slaves the protection of the law. To each of these two extreme positions there were possible variants. The position taken at the time by any layman

or lawyer was the result of his life experiences and political philosophy. From these influences the Justices of the Supreme Court were not free. The case parallels that of *M'Culloch v. Maryland*. Both involved an interpretation of the extent of Federal power; in each the opinion was written by an able strong man with no doubt as to the correctness of his conclusion. Marshall, the Federalist, took a broad view of Federal power; Taney, the Jacksonian Democrat, emphasized the rights of the States. We cannot say that either decision was right or wrong. History has justified the first; the Civil War ended slavery the existence of which in a part of the country made the decision of the second at the time it was rendered vitally important to the people of the United States. And what of Dred Scott whose name plays such a large part in our history? Ownership of Dred Scott and his family had passed from Sandford to Mrs. Emerson. The latter, upon the death of her husband, Dr. Emerson, had married an abolitionist member of Congress from Massachusetts and the two then conveyed Dred Scott and his family to Taylor Blow of St. Louis upon condition that they should be emancipated. This was done and within a few months after the decision of *Dred Scott v. Sandford,* Dred Scott was a free man.[93]

Chapter V.

Some Present Problems of Constitutional Interpretation.

General Character.

Apart from problems relating to the interpretation of particular provisions of our written Constitution, the general constitutional problem which confronts us today is essentially similar to that which confronted the delegates to the Convention of 1787: How to give the National government power to enable it to deal with matters of national concern while insuring to the several States control over matters of local concern. The labors of the Convention gave to the United States of the 1790's a Constitution which did give to the Federal government ample power to deal with the then matters of national concern. In spite of the growth of the country and the industrial development of the Nineteenth Century, this Constitution, as written by the Convention of 1787, was until recently, universally regarded as still conferring upon the Federal government all the power which it was necessary that it should have; though it is proper to point out that this general belief in the adequacy of the powers of the Federal government was due to the broad construction which the decisions of Marshall gave to Federal power and the effect of that power in limiting State action.

Is the power of the Federal government sufficient today to deal adequately with matters of national concern? As far as the "common defense" and our relations with foreign countries and their peoples are concerned, few today doubt that the Constitution as interpreted confers on the Federal government ample power. On the other hand, many doubt whether there is sufficient power to deal today efficiently with

the industrial and social conditions which our economic development has made matters of national concern.

This doubt finds its origin in the abandonment by many persons of the policy of governmental laissez-faire which predominated public opinion during the major part of the Nineteenth Century. The power of the Federal government to regulate interstate commerce is the principal power it may exercise to affect industrial and social conditions and yet it was not until the adoption of the Interstate Commerce Act in 1887 that Congress exercised this power, except in such minor matters as the licensing of coastwise vessels. The need felt during almost all the Nineteenth Century was that government, State and National, should leave business and industry to regulate themselves, although its protection from foreign competition was the favorite policy of one of our two National parties. Thus, the power over interstate commerce vested in the Federal government had important practical effects in limiting State action, but no practical effect in promoting positive action on the part of the United States.

Today, for good or evil, we have changed all of this. Large classes of people believe that to preserve our so-called capitalistic industrial system on which our peculiar civilization is founded it is necessary for government to exercise a very considerable positive control over the relations between large industrial combinations and the consumers of their commodities and services as well as over the relations between employer and employed. This is coupled with the further belief that efficient control over these matters cannot be exercised by the States but requires, if they are to be effectively dealt with, Federal action.

It is not my intention to discuss whether this increasing desire for industrial and social legislation is wise, or even the question of whether the States without action by the Federal

government effectively can do that which is required to be done. I content myself with merely stating as a fact that a large proportion of our people—whether a majority or not I do not pretend to know—give an affirmative answer to both of these questions and demand Federal legislation of a varied and important character. The very fact of this demand, which in many instances has demonstrated its political effectiveness, raises important questions pertaining to the interpretation of the Constitution.

A large proportion of the Federal Acts adopted or proposed in response to the demand for industrial and social legislation raises one or sometimes two of the following questions:

(1) Has the Federal government, or indeed either the Federal or the State government, power to regulate prices of commodities and services?

(2) Has the Federal government power to regulate production?

(3) Has the Federal government power to carry on business?

Those who are opposed to the government, or at least the Federal government, doing any or all of these things will desire a reply as nearly as possible entirely negative; those who believe that government, and for effective action the Federal government, should often regulate these things will want answers as nearly as possible completely affirmative. With these desires I have nothing to do here. What I wish to do is to consider each of these questions as questions of constitutional interpretation.

Has the Federal Government or the State Governments Power to Regulate Prices of Commodities and Services?

Entirely apart from possible applicable express constitutional restrictions, it may be contended, if we use the old concept of "natural rights," that the individual, with, of course, reasonable exceptions, has the privilege, with which government cannot constitutionally interfere, to dispose of his property at any price he pleases. The Eighteenth Century theory of "natural rights" has ceased to appeal, and it may be assumed that any limitation upon the power of National or State governments acting within their respective spheres is to be found, if at all, within the provisions of the Fifth and Fourteenth Amendments that "no person shall be deprived of life, liberty or property without due process of law."

My primary object is to show the possible interpretations of this Due Process Clause as applied to the question of price regulation, merely stating by way of information what I believe to be, from its decisions, the present position of the Supreme Court in respect to the question.

Any one of three constructions can be given to the Clause; meaning by the expression "can be given" that the construction can be supported by reasonable argument. These are that

(1) the limitation is confined to restraining the Executive Branch of the Government from depriving a person of life, liberty and property without warrant of statute or the common law;

(2) in addition to preventing such deprivation as would be prohibited under (1), it also prevents the Legislative Branch of the Government from so alter-

ing the adjective law as to deprive the individual charged with crime or against whom a claim is made of the protection of those rules which experience has shown to be necessary to give adequate protection to life, liberty or property;

(3) in addition to preventing such deprivation as may occur through interpretations (1) and (2), it prevents any legislation prescribing unreasonable rules of substantive law.

Historians have always differed and will probably always differ as to the meaning intended to be given to the Clause when the Fifth Amendment protecting the individual against Federal action was adopted. Personally, I believe there is a good deal to be said for the belief that the intent was to protect the individual from a violation of the first rule as above stated and possibly of the second, but not as restricting the Legislature from unreasonably altering rules of substantive law. The experience of those living in 1791 had been with the arbitrary executive action of the Crown and the royal agents and, to some extent, with the violation of time honored rules for the protection of persons accused of crime. By 1868, however, when the Fourteenth Amendment was adopted to protect the individual from State action there is much to be said for the belief that the Due Process Clause was intended to be also a guarantee to the individual against unreasonable legislation affecting substantive rights.

The Supreme Court has adopted the third and broader interpretation for both the Fifth and Fourteenth Amendments.[94] The effect has been to broaden greatly the control of the Court over legislation, State and Federal,[95] and this broadened control has had and is having a profound effect

on our political and constitutional development. What is unreasonable deprivation of the individual's "life, liberty and property?" No more vague expression could well be imagined. Interpreted as protecting the individual against arbitrary government action, whether legislative, executive or judicial, it enables, and indeed almost requires, a member of the Supreme Court to condemn any act as unconstitutional which is condemned by his sense of social justice, in view of his economic and social concepts. This great judicial power, itself the result of the Supreme Court's interpretation of the scope of the "Due Process" Clause, gives weight to the charge that the United States is governed in the last analysis by the judiciary. However, whether true or not, the charge does not constitute an argument against the Court's broad interpretation of the meaning of "Due Process of Law." As just stated, there is much in the history of the adoption of the Fourteenth Amendment justifying such interpretation. Admitting this, it would be somewhat strained to give a less broad interpretation to the same words in the Fifth Amendment.

The Court having taken the position that any unreasonable and arbitrary legislation is prohibited, the question for our present purposes is what is unreasonable regulation of the price of goods or services. In answering this question the following general rules of construction may be contended for:

(1) Price regulation is never unreasonable unless the statute unreasonably discriminates between those who buy or sell the same article or those who furnish or use the same services, or fixes prices unreasonably low.

(2) Price regulation is unreasonable if the production of

the commodity or services is not affected with a public interest or is discriminatory or confiscatory in the sense used in (1).

We have passed sufficiently from the era of extreme individualism to be justified in ignoring a third possibility that any regulation of prices of any article or service under any circumstances is arbitrary and a denial of due process.[96]

Up to the present time the Court has proceeded on a combination of the second and first rules just stated. To justify price regulation, the article or service must be affected with a public interest and must not unreasonably discriminate between dealers in the commodity or the service.[97] At first, when price regulation was upheld, the Court as testing whether there was a public interest looked to whether those selling their services or goods had a "virtual monopoly" or had made an "unintentional dedication or devotion" of their property to the public.[98] Since the decision in *Nebbia v. New York*[99] a majority of the Court has followed the rule that prices of commodities may be regulated when the commodity is of such importance to the consumers, producers and general public that a regulation of the price ceases to be an interference with the private rights of buyers and sellers and becomes a matter of public concern. Under this decision it is no longer necessary as it once was to make the existence of the public interest depend upon the existence of "monopolistid privileges," "monopolistic tendencies" or a "dedication of the property to the public." All that is necessary is for the Court to find what it deems to be a direct relation between regulation and the public good.[100] If it finds this relationship exists and the regulation is not discriminatory or arbitrary the constitutional requirements of "Due Process" are satisfied.[101] The trend of the decisions is un-

questionably toward extending the number and variety of services and commodities the prices of which can be regulated by law. This tendency can be checked or accelerated by a change in the personnel of the Court, the question of what is unreasonable deprivation of property, that is a deprivation by undue process, being influenced by the life experience and the political and social viewpoint of the person expressing the opinion.

Has the Federal Government Power to Regulate Production?

Without saying that there may not be other clauses of the Constitution which affect the power of the Federal government to regulate production, I shall confine my consideration of the question to the effect of the Clause which gives that government power to regulate commerce between the States. The case of *Gibbons v. Ogden,*[102] which we have discussed, and the later decisions of the Supreme Court enable us to say that at present the transit of persons, property or intelligence which at some stage of the transportation or transmission crosses a State line constitutes interstate commerce.[103] For regulatory purposes,[104] if not for taxation,[105] goods from the beginning of their transit are subjects of interstate commerce until, after their journey is ended, they are sold or the package in which they are carried broken.[106]

The transportation of commodities is one thing; their production another. The process of production, considered as isolated from any transaction of which it may form a part, is clearly not commerce, either inter- or intra-state. May, however, production become a commercial act if carried on with the intent of selling the commodities produced; or, to make the question applicable to the Commerce Clause

of the Constitution, can it be said that the production of commodities is interstate commerce when

(1) they are produced as the result of a contract to produce and deliver them to a person in another state; or

(2) they are produced as the result of a contract to deliver such commodities to a person in another state; or

(3) in the absence of any contract, they are produced with the intention to deliver them to a person in another state; or

(4) where the great majority of such commodities are on production, transported to other states.

If production in the situations falling under the fourth of the above categories is regarded as part of interstate commerce, the power of the United States to regulate industry is very great. In 1789, only a comparatively small fraction of the things produced was exported to other states. Today, most, or at least a large part, of the things produced are transported for consumption in states other than the state of their production. A strong argument, however, can be made in favor of this broad construction. It can be pointed out that while there has been a tendency to emphasize the element of transportation or transmission as constituting commerce,[107] ignoring the element of commercial activity,[108] it is probable that those who framed the Constitution conceived of interstate commerce as synonymous with interstate commercial activity. Merchants were interested in a profit after the economic cycle of production, distribution and sale had been completed; production was as much an incident of this cycle as transportation. However, prior to the recent

decisions [109] sustaining the validity of the Wagner Act creating the National Labor Relations Board,[110] the Supreme Court in *Carter v. Carter Coal Company* (1936),[111] known as the *Guffey Coal* case, decided that production is neither interstate commerce nor does it directly affect such commerce even though 97½% of the product is transported in the normal course of business to other states.[112] At the time of the decision it did not seem probable that a broader construction would be given to the Commerce Clause, at least for some years, although before that decision the Supreme Court had held that where goods are sold within their state of origin and in the normal custom of trade are exported from that State, that such a sale is so much a part of interstate commerce that it may not be regulated by the State in which the sale is made.[113] Similarly, sales of grain or products at the great regional exchanges where goods are brought into the state only for the purpose of a sale after which they are exported to other States were held to be so much part of interstate commerce that the Federal government alone may regulate such sales.[114] If an otherwise local sale is thus brought within the Federal regulatory power merely because it, figuratively speaking, stands upon the brink or in the middle of a stream of goods which habitually crosses state lines, it is difficult to understand why the production of goods which in the natural course of transaction repeatedly find their way into the channels of interstate commerce cannot be regarded as interstate commerce and subjected to Federal regulation.

In April, 1937, the constitutionality of the Act of Congress creating the National Labor Relations Board, known as the Wagner Act, was decided by the Supreme Court. The theory of the Act rests upon two premises; first, that the free flow of commerce between the States is often ad-

versely affected by strikes and labor disputes, and second, that the recognition of the right of employees to bargain collectively with their employers through a union chosen by a majority of the employees will minimize, if not avert, the rise of such labor difficulties. To this end, the Act establishes a National Labor Relations Board. On the petition of any group of persons employed in an establishment the Board superintends an election to determine the labor organization which the majority of the employees desire to have act as their representatives. If the result of the election is the selection of a particular union the management is obliged by the Act to meet and confer with representatives of the organization selected. The management and the union, however, are not obliged to come to any agreement. The employees are still free to strike; the management still free to close the plant, or make such contracts as they are able to make with individual workers, the theory being that around a table the representatives of management and labor will normally settle their differences.

The Act has another side. It makes it illegal for an employer to discharge any employee because of union activity, or discriminate against any employee for a similar reason where such "unfair practices" affect interstate commerce, the employer violating these provisions being liable for the back pay of the employee improperly discharged as well as being obligated to reinstate such employee in his former position.[115]

There were five cases before the Supreme Court involving the constitutionality of the Act in all of which the Board had found unfair practices. Three of the cases involved the discharge of employees in establishments for the production of commodities, and it is with these cases that we are here concerned.[116] In one case the raw materials were produced

in great part on properties owned by the same corporation or its subsidiaries.[117] In all three, the bulk of the raw material came from other States, and in all the finished product was in great part sold in States other than the State of their manufacture after being transported to such States by the manufacturing corporation.[118] Chief Justice Hughes, speaking for the majority of the Court in the case of the *National Labor Relations Board v. Jones and Laughlin Steel Corporation*,[119] took the position that the power of Congress to protect interstate commerce from matters directly affecting it is not limited to those matters which affect merely the facilities by which the commodities are transported from State to State; but that the power also extends to the prevention of any interruption in the production of commodities where a sufficient relation between production and transportation can be found by the court. Such a relation was found to exist where the bulk of the raw materials was brought into the State of manufacture from other States and the bulk of the commodities when manufactured was transported to and sold in other States. In the course of the opinion the Chief Justice says: "* * * of what avail is it to protect the facility of transportation, if interstate commerce is throttled with respect to the commodities to be transported * * *."[120]

This sentence which apparently expresses the rationale of his interpretation of the commerce power would seem to show that it is not necessary, in order to subject the processes of production to regulation by the Federal government, that the raw material used in the manufacture come from other States, provided the bulk of the finished product is transported and sold in other States. However, it is perhaps dangerous to push the decision beyond the facts of the case.[121] Even so limited, the Court at present may be said

to approach the fourth and widest of the possible constructions of the commerce power above enumerated. Certainly, the Commerce Clause as construed in these cases gives to the Congress under the present organization of industry a large measure of control over production.

Has the Federal Government Power to Carry on Business?

The word "business" is used in several somewhat different senses. As I employ it, however, "business" is a course of conduct involving the sale or donation of services, the purchase or production of commodities and their sale or donation.

This is a wide definition of the word in that it includes a course of conduct not necessarily carried on for the purpose of profit. But in that it does not include a series of productive acts not followed by a sale of the things produced, it is narrower than some uses of the word in common speech. For instance, the Federal Government, having the express power to "establish post offices and post roads" [122] and "to provide and maintain a navy," [123] can build post offices, post roads and warships. Such building, though systematic and extensive, would not be engaging in business as above defined. On the other hand, the operation of the Post Office Department is unquestionably within the definition. Again for the purposes of this discussion, the systematic sale of used products by the user, as worn out naval vessels, would not be regarded as carrying on a business; but the systematic sale of the bi-products of public works which the Federal Government may constitutionally operate is carrying on business, even though the sale of the bi-product is a mere incident to the public work and not the reason for its undertaking.

It is generally recognized that the Federal Government

is one of enumerated powers. These powers are of two kinds: To do a specific act or acts, that is, carry on a specific course of conduct, and to make law, that is, to lay down a rule of conduct for the breach of which a direct or indirect sanction is provided. While the distinction between the two kinds of powers is clear, the language of the Constitution in conferring a specific power often raises the question whether both or only one kind of these two classes of powers is conferred. Does, for instance, the power to establish post offices or post roads include the power to enact a statute to prevent a private person from entering into the business of carrying mail? On the other hand, does the power to regulate foreign and interstate commerce, which unquestionably includes wide law making powers, also confer the power on the Federal Government to enter into interstate commerce business? These are questions on which reasonable differences of opinion as to the correct answers may exist.

The Federal Government in the past has rarely, if ever, attempted to carry on a business in competition with existing private business. Whether in certain particular instances it is now doing so, as for instance, in its operations through the Tennessee Valley Authority, is a disputed matter of fact. On the other hand, as an incident to education or other service or improvement it has produced or purchased commodities for free distribution as, for instance, the free distribution of seeds to encourage agriculture. Again, sufferers from floods and other disasters as well as those unable to obtain work have received direct donations of money without the constitutionality of the expenditure being questioned in the courts. We may assume that the purchase of things and their distribution to the needy would be equally immune even though many may privately doubt, as the late

President Cleveland publicly doubted, the constitutionality of grants of money or the distribution of supplies for relief.

The Constitution does not specifically say that the Federal Government has the power to go into business. Any exercise of the power must be incidental to one of the enumerated powers. Wide differences of opinion may and do exist as to the extent of the power conferred on the Federal Government by grants of power confined to specific subjects. But, besides grants of power over specific subjects, the first paragraph of the Eighth Section of the First Article of the Constitution frequently referred to as the "General Welfare Clause" states:

> "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

There are several possible interpretations of this clause. For instance it may mean that Congress may

(a) do anything (that is, enact any law or provide for the Federal Government's carrying on any course of conduct) which it believes promotes the general welfare;

(b) expend money in any manner it believes will promote the general welfare, or

(c) expend money to do those things which it is otherwise authorized to do if it thinks such expenditure will promote general welfare.

The first interpretation would give to the Congress power not only to expend money for any purpose, but would enable it to legislate on any subject. There are two difficulties with

this interpretation: First, it renders all other grants of power to the Federal Government meaningless because superfluous; second, interpreting the paragraph as conferring on the Federal Government the power to do any thing to promote the "general welfare" disregards the context. When the paragraph is read as a whole there is much to be said for interpreting it as relating only to the promotion of the general welfare by the expenditure of public funds.

The third and narrowest interpretation, if adopted, would have to overcome the obstacle that it would render unconstitutional the practice of many years, lately much increased, of grants by the Federal Government for relief.

The second interpretation of the General Welfare Clause is at present dominant.[124] Under this view Congress can expend its money in producing commodities to be donated to persons in need or in giving services and to this extent at least carry on business, although such business is in no wise incidental to any other grant of Federal power. It is, however, a matter of doubt whether under this second interpretation of the General Welfare Clause it would be possible to carry on a business the main object of which was to secure from the profits more money for the Federal Government. It may be contended that the power granted in the General Welfare Clause is limited to the expenditure of money obtained, not by profits from the carrying on of a business, but by some form of taxation.

It will be perceived that the answer to the question stated in the foregoing paragraph, like the answer to most important doubtful questions of constitutional interpretation, depends largely on the political, social and economic theories and background of the person asked. If the answerer takes the position that under the General Welfare Clause obtaining profits from carrying on business is one of the ways to ob-

tain funds to be expended for the public welfare, there is no constitutional limitation to the kind of business the Federal Government can conduct or the place or places where it can be carried on. It would not have to be an interstate business or a business connected with any other power of the Federal Government enumerated in the Constitution. On the other hand, if the answerer confines the types of business which can be carried on by the Federal Government under the General Welfare Clause to those businesses the main or a principal object of which is not profit, the answer would not mean that the Federal Government could never engage in a business for profit, but merely that the constitutional power to do so must be derived from some other clause or clauses, not from the General Welfare Clause.

At present, or in the immediate future, the Federal Government is not likely to engage in business solely or even mainly for the purpose of adding to the funds in the United States Treasury. It is much more within the bounds of present possibility that the Federal Government may carry on a business mainly because the services rendered or the commodities produced by private persons in similar businesses are regarded as defective or because there is a demand for lower costs to users of certain kinds of services or to consumers of certain kinds of goods. Furthermore, whether we adopt the second interpretation of the General Welfare Clause or not, the first businesses on the constitutionality of the Federal Government's conduct of which the Supreme Court will be asked to pass will be probably those that can at least be argued to be incidental to a grant of Federal power in the Constitution over some specific subject. Thus, though admitting that prophesy is always a doubtful undertaking, one may with some reason look forward to the Supreme Court being asked to pass on the constitutionality of the Fed-

eral Government's carrying on various businesses alleged to be within the field of foreign and interstate commerce.[125]

Already the Federal Government, through the organization known as the Shipping Board and the Fleet Corporation, has engaged in transportation by sea.[126] It may however, be contended that their activities were carried on to effect sales of the large number of vessels which the Federal Government possessed at the end of the World War and, therefore, that the Shipping Board and Fleet Corporation activities can be sustained under the War Power.

If and when a case comes before the Supreme Court involving the constitutionality of the Federal Government carrying on a particular business, should the Court hold that the constitutionality of the activity cannot be supported under the General Welfare Clause, or under any other clause except the Commerce Clause, the members of the Court will be confronted with the crucial question whether that Clause gives to the Congress, like so many other Clauses in the Constitution, not only legislative power, but also the power to carry on certain courses of conduct. Or, to put the matter in another way: Whether the power to "regulate commerce" includes the power to regulate by engaging in commerce.

If an affirmative answer is given to this question, it would follow that the United States could operate the railroads or any other interstate or foreign transportation business. Furthermore, though the Commerce Clause is limited to conduct involving the passage of persons, ideas, goods or energy across state lines, we have seen in our discussion of the question whether the Federal Government can regulate production that under certain conditions acts of production may be so intimately connected with the free flow of one or the other of these things across state lines that under the Commerce Clause the Congress can regulate such acts by law. There-

fore, if the power to regulate interstate and foreign commerce includes not only legislative power but the power to regulate by entering into such commerce, the Government can carry on any production which in private hands it can regulate by law. Thus, if it can regulate a certain manufacturing business it can carry on that business. It should be remembered, however, that though this interpretation of the Commerce Clause unquestionably opens a field for business activity on the part of the Federal Government involving the production of some commodities, the extent of that field is largely a matter of conjecture. It depends on the extent of the integration of business in large units as well as on other factors political, social, economic and the reaction of the members of the Supreme Court to these things.

Whether the Federal Government may carry on any business or only business within limited fields, once the constitutionality of the Federal Government's entering into the business is sustained by the Supreme Court there may and probably will arise a number of subsidiary constitutional questions. Some of these questions may be stated as follows:

(1) Can the Federal Government in carrying on a business disregard the regulations of the State in which the business is carried on?

(2) Can the Federal Government in carrying on the business acquire property by eminent domain?

(3) If the Federal Government sells the products of a business it conducts below cost, would it by so doing deprive those already in the business or those desiring to enter the business of their property without due process of law as prohibited by the Fifth Amendment?

It would carry us too far into the field of speculation to discuss in detail the possible answers to these questions. A few statements concerning them must suffice.

As to the first question there would appear to be no doubt that the Federal Government could disregard any state regulation of the business on which it was embarked as to matters which the Federal Government could itself exclusively regulate if the business were carried on by a private person or corporation. If the business were interstate business, therefore, the Federal Government carrying on such business could disregard all such state regulations.[127]

On the other hand, if the business carried on by the Federal Government was an intrastate business, even though the carrying on of it might be held to be within Federal power under the General Welfare Clause, it would be doubtful as to whether the Federal Government could constitutionally disregard state regulations under which private persons and corporations would have to operate a similar business.[128]

Turning to the second question, the one relating to eminent domain, it would appear certain that the Federal Government can do what it could authorize a private person or private corporation formed under Federal law to do. Should the Federal Government desire to build and operate a railroad between points in different states, assuming that it would be constitutional to do so, it would apparently follow, as experience shows a railroad cannot be built without taking property by eminent domain, that the Federal Government could exercise that power. On the other hand, should it be held constitutional for the Federal Government to carry on an intrastate business or a business where the taking of property by eminent domain is not an ordinary incident of its operation, it is very doubtful whether the mere fact that the business was conducted by the Federal Government would

enable it to exercise the power of eminent domain in connection with its operation.

As to the third question, like most others in which it is possible to contend that the action of government violates the requirement of "Due Process of Law", the principles and rules under which it may be determined are too nebulous to make any forecast without knowledge of what will be the reaction to similar questions on the part of the members of the Supreme Court at the time when a case raising this question is presented. The assumption that the use of Federal money to furnish goods or services at a price below any reasonable estimate of cost and which results in the ruin of competing established businesses is unfair, unless compensation is given, does not necessarily determine the constitutional question.[129] All unfair actions, even some resulting in considerable loss to others, are not "taking property without due process" even within the widest known concept of the constitutional prohibition. On the other hand, there is a tendency to hold the process by which harm is inflicted a "taking without Due Process" if it greatly shocks the general sense of justice. What may not "so shock" this year may do so later. Furthermore, no case likely to arise is ever quite so simple as the one just stated. Real cases have almost always a number of additional facts; each perhaps not important in themselves, but as a whole, carrying considerable weight on one or the other of the scales by which man tends to test injustice.

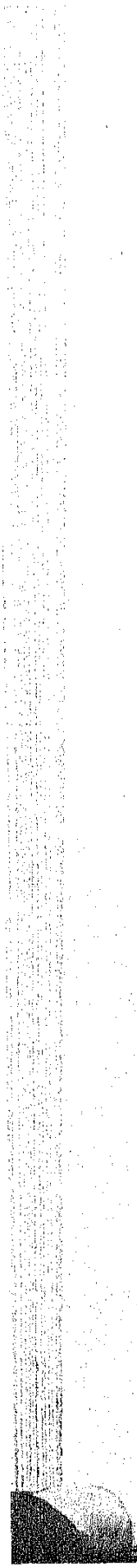
SOME CONCLUDING REMARKS.

In my introductory remarks I stated, in accordance with what I believed should be the principle guiding teaching pertaining to political, economic and social matters in a university—especially a university founded by Mr. Jefferson—, that while I would try to give you material facts pertaining to

my subject and help you to analyze the problems, I would leave you to form your own opinions without any expression of my own.

Let me now again emphasize that I am not concerned about the opinions you may form nor should you be about mine. Should I here express my own opinions, such expression should not affect your conclusions, for if it did, by so much would it deter you from doing your own thinking. I am much concerned that you should not only know the more important problems connected with interpreting the Constitution, but, through hard thinking, come to definite conclusions. You should have your own reasoned opinion on the question whether the Supreme Court and not the Congress or some other body should be the authoritative interpreter of the Constitution. You should have your own reasoned opinions on the extent of the Federal power under such clauses in the Constitution as the General Welfare clause and the Commerce clause; you should have your own reasoned opinion on whether the Due Process of Law clauses should apply to other matters than procedure.

Throughout these lectures I have often had occasion to point out that often two or more different opinions on the various matters we have considered can each be supported by reasonable arguments. But do not, therefore, by seeing all sides in an atmosphere of intellectual unreality, regard one opinion as being as good as another. The fact that you rightly realize that the other fellow can support his conclusions by reasonable arguments should make you tolerant of him, but none the less firm in your own convictions. On important public questions one opinion is never as good as another. It is your business as responsible citizens of a democracy to have reasoned opinions and to act upon your convictions.



Notes

These notes were prepared under my supervision by Ronald A. Anderson of the Philadelphia Bar.

W. D. L.

[1] *Schechter Poultry Corp. v. U. S.*, 295 U. S. 495 (1935).

[2] *New York Times*, December 12, 1936, page 1.

[3] Garner, *Introduction to Political Science* (1910) 404; Charles Martin and William George, *American Government and Citizenship* (1927) 175-186; Ogg and Ray, *Introduction to American Government* (1925) 28, 30, 32-4.

[4] After efforts to amend the Articles of Confederation had proven futile because of the requirement of an unanimous approval by the several states, a partial remedy for the current governmental evils was sought by extra-legal co-operative pacts between the states. That these governmental evils were national in scope and in significance is seen from the resolution which convened the Constitutional Convention: "to take into consideration the situation of the United States, to devise such further provisions as shall appear . . . necessary to render the constitution of the federal government adequate to the exigencies of the Union and to report such an Act for that purpose to the United States in Congress assembled . . ."

[5] The debates in the Constitutional Convention during the adoption of the commerce clause brought into clear view the division of the country into hostile trade groups: "(1) the fisheries and West Indian trade, which belonged to the New England states, (2) the interest of New York (which) lay in free trade, (3) wheat and flour, the staples of the middle states—New Jersey and Pennsylvania; (4) tobacco, the staple of Maryland and Virginia, and partly of North Carolina; (5) rice and indigo, the staples of South Carolina and Georgia." (C. Pinckney, 2 Farrand, *Records of the Federal Convention* (1911) 449). The south, whose interest lay in the exportation of the staples tobacco, indigo and rice feared a coalition of the northern and middle states which would control the Congress and regulate commerce to their sectional advantage. Efforts of the southern delegates to secure the requirement of a two-thirds majority for the enactment of Federal commerce laws were unsuccessful. This same fear of a coalition of shipping interests was also respon-

sible for the grant of immunity to the slave trade contained in Article I, Section 9, Clause 1 of the present Constitution. Warren, *The Making of the Constitution* (1928) 8-11, 15-23, 567-589; Farrand, *The Framing of the Constitution* (1913) 5-7, 12-18, 85-6, 152, 208-210.

[6] The plan of the Electoral College resembled electoral devices employed in a number of the states. European electoral devices resembling in some respects the plan of the Electoral College were mentioned in the debates in the Convention and their defects criticized. See Hutchison, *The Foundations of the Constitution* (1928) 167-175.

[7] No mention was made of a bill of rights in the Constitutional Convention until the work of the Convention was nearly completed. Some effort was then made to have such guarantees included but was defeated. Although the Federalists contended that such provisions were unnecessary since the Federal government could do only those acts which came within the powers delegated to it, ratification of the Constitution was obtained in Massachusetts, Connecticut, New York, Virginia, and North and South Carolina only after an understanding was reached that suitable amendments would be proposed to the new Congress.

The number of amendments which were proposed by the states is not definitely known. The authoritative work of the late Professor H. V. Ames, *The Proposed Amendments to the Constitution of the United States,* [Am. Hist. Assn. Ann. Rep. (1896) Vol. II, p. 19] places the number at 124 while other writers vary from 78 to 145. In June, 1789, Madison, who had been elected to the House of Representatives upon a promise to advocate the adoption of a bill of rights, introduced a number of proposals of which the House approved 17. The Senate reduced the number to 12, of which 10 were ratified by a sufficient number of states. C. McLaughlin, *Constitutional History of the United States* (1935) 204, 206, 210-211; Mott, *Due Process of Law* (1926) 145-6, 150-4; Warren, *The Making of the Constitution* (1928) 37, 111, 114, 118, 122, 317.

[8] The attitude of the framers of the Constitution as to whether a power would exist in the courts to declare Federal acts void upon the ground of repugnancy to the Constitution has been fully examined by a number of able writers. See Beard, *The Supreme Court and the Constitution* (1916); Corwin, *The Doctrine of Judi-*

cial Review (1914); Melvin, *The Judicial Bulwark of the Constitution* (1914) 8 Am. Pol. Sci. Rev. 167; *Report of the Committee upon the duty of courts to refuse to execute statutes in contravention of the fundamental law,* Report of the New York State Bar Ass'n (1915) 230ff.

Statements of John Rutledge (2 Farrand, *Records of the Federal Convention* (1911) 428); Charles Pinckney (Farrand, op. cit., 2:248, 298); Nathaniel Gorham (Farrand, op. cit., 2:79) and Roger Sherman (Farrand, op. cit., 2:28) have been cited by commentators as expressing views favorable to the doctrine of judicial review. A fair reading of these statements in the light of their context fails to show any definite attitude of these delegates upon that point. The same comment may be made of the statements of John F. Mercer (Farrand, op. cit., 2:298) and Gunning Bedford (Farrand, op. cit., 1:100-101) who have been regarded as denying that the Federal courts would have such a power.

It would thus appear that of the framers 8 recognized in the Convention itself that the Federal courts would possess the power of judicial review of Federal statutes while possibly 2 denied its existence. In the contest over ratification 11 of the framers expressed views which recognized the doctrine and in the first Congress, 8 of the framers took action which might be construed as favoring and 2 as denying that doctrine. Association with litigation in which state statutes had been declared unconstitutional by state courts would indicate that 6 of the framers approved while 1 disapproved of judicial review. After making necessary allowances for those members of the Convention who expressed their views upon more than one of the above classes of occasions, it would appear that 27 of the framers may have recognized as an attribute of a court the power to pass upon the constitutionality of legislative acts of a co-ordinate branch of the same government which created the court while 3 may have denied its existence.

[9] 1 Cranch 137 (U. S. 1803).

[10] Ch. 4; 2 *Stat.* 89.

[11] *U. S. Const.,* Art. III, Sec. 1.

[12] Act of February 27, 1801, Ch. 15, Sec. 11; 2 *Stat.* 103, 107.

[13] 3 Beveridge, *The Life of John Marshall* (1919) 110-111. See also 1 Cranch at 146 (U. S. 1803).

[14] Act of September 24, 1789, Ch. 20, Sec. 13; 1 *Stat.* 73, 81.

[15] Ch. 4; 2 *Stat.* 89.

[16] Ch. 31; 2 *Stat.* 156.

[17] 1 Cranch at 173 (U. S. 1803).

[18] Although the lower Federal courts had authority to issue writs of mandamus by virtue of the provision of Section 14 of the Judiciary Act of September 24, 1789, Ch. 20, 1 *Stat.* 73, 81-2, conferring upon them the power "to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions," the construction given this provision by later decisions of the Supreme Court would have prevented the issuance of a writ in the situation presented by the case of *Marbury v. Madison. McIntire v. Wood,* 7 Cranch 504 (U. S. 1813); *Bath County v. Amy,* 13 Wall. 244 (U. S. 1872); see also *McClung v. Silliman,* 6 Wheat. 598 (U. S. 1821); *Kendall v. United States ex rel. Stokes,* 12 Pet. 524 (U. S. 1838); 1 Hughes, *Federal Practice Jurisdiction and Procedure* (1931) § 268. Had Marbury been able to secure a declaration by Congress that it was the duty of the Secretary of State to deliver his commission, it is possible that he could have obtained a writ of mandamus in the Circuit Court of the District of Columbia. See *Kendall v. United States ex rel. Stokes, supra.*

[19] When the litigation over the title to the Fairfax lands in Virginia came before the Supreme Court, Marshall declined to participate in the proceedings which terminated in favor of the Fairfax title. Marshall as private counsel had represented Fairfax's devisee and purchasers holding under the Fairfax title and either Marshall or his brother claimed the ownership of another portion of these lands under the Fairfax title. See Warren, *The Supreme Court in United States History* (1932) 444-5. Compare the action of Chief Justice Taney in the case of the *Bank of the United States v. United States,* 2 How. 711 (U. S. 1844); 5 How. 382 (U. S. 1847), discussed by Cummings and McFarland in *Federal Justice* (1937) 114-7. As Attorney-General under Jackson, Taney had advised that a certain claim of the bank against the United States was invalid. When the issue finally came before the Supreme Court, Taney was Chief Justice of that court. Because of his connection with the case he felt required to take no part in the action of the court but he nevertheless prepared a written opinion in support of his former decision as Attorney-General which he had printed as

an appendix to the official Supreme Court reports. 2 How. 745 (U. S. 1844).

[20] See *infra* note 60.

[21] Act of April 29, 1802, Ch. 31; 2 *Stat.* 156.

[22] Act of May 3, 1802, Ch. 52, Sec. 8; 2 *Stat.* 193, 194-5. The Circuit Court of the District of Columbia held this act unconstitutional as applied to the justices of the peace who had received their commissions in that it altered the compensation to which as judges they were constitutionally entitled. *United States* v. *Benjamin More.* (The opinion in this case appears as a footnote to 3 Cranch (U. S.) 159 ff.) An appeal was taken to the United States Supreme Court but was dismissed for lack of appellate criminal jurisdiction over the Circuit Court for the District of Columbia, the original proceeding having been a prosecution of a justice of the peace for having collected fees under claim of right conferred by his office, which right the statute purported to abolish. *United States v. Benjamin More,* 3 Cranch 159 (U. S. 1805).

The right to collect fees for their services was restored to the Justices of the Peace for the District of Columbia by the Act of February 24, 1807, Ch. 18, Sec. 3; 2 *Stat.* 422.

[23] For a discussion of contemporary reaction to the decision, see 1 Warren, *The Supreme Court in United States History* (1932) 243ff.

[24] It has been frequently observed that the Supreme Court in the period under discussion would often indulge in an exposition of law rather than confine itself to a decision of the facts before it. This process accelerated the development of a body of Constitutional law although to the mind trained in the common law the value of such law, resting largely on a priori generalizations, is doubtful.

It is interesting to note that the inverted order of Marshall's opinion was employed in *Kendall v. United States ex rel. Stokes,* 12 Pet. 524, 609 (U. S. 1838), where the Court stated that the case presented "two general inquiries:

"1. Does the record present a proper case for a *mandamus?* and if so, then,

"2. Had the Circuit Court of this district jurisdiction of the case, and authority to issue a writ?"

[25] See 3 Beveridge, *Life of John Marshall* (1919) Appendix C, p. 610ff; 1 Warren, *The Supreme Court in United States History,* (1932) 63-69; Haines, *The American Doctrine of Judicial Suprem-*

acy (1932) Chaps. V-VIII. For the view that the cases of *Chandler v. Secretary of War* (1794) and *U. S. v. Todd* (1794) may be considered as forerunners of *Marbury v. Madison,* see Haines, op. cit., pp. 175-9. See also *Hayburn's Case;* Farrand, *The First Hayburn Case,* Amer. Hist. Rev. (1907) XIII; 2 Dallas 410 note; Warren, op. cit., vol. I, pp. 70-81.

[26] See *supra* note 8.

[27] The application for the writ of habeas corpus was made pursuant to Section 14 of the Act of September 24, 1789, Ch. 20; 1 *Stat.* 73, 81-2, providing that "justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment . . ."

[28] *Ex parte Merryman,* Fed. Cas. No. 9,487 (C. C. D. Md., 1861).

[29] After receiving the opinion of Taney, Lincoln sought the advice of his attorney-general who stated that the president, being charged with the protection of the public safety, had a discretionary power to suspend the writ of habeas corpus during an insurrection and that the high court of impeachment alone could question the propriety of his action. Opinion of the Attorney-General, July 5, 1861, *War of the Rebellion: Official Records of the Union and Confederate Armies,* Series II, Vol. 2, pp. 20-30. In the controversy over the suspension of the writ which followed, the authority of Lincoln was also supported by Horace Binney in a series of pamphlets (*The Privilege of the Writ of Habeas Corpus under the Constitution,* Philadelphia, 1862, 1863, 1865).

By general proclamation, Lincoln suspended the writ as to all persons arrested for disloyal practices [September 24, 1862; 6 Richardson, *Messages and papers of the Presidents* (1899) 98-9]. It was not until March 3, 1863, that the Congress was able to agree upon a statute dealing with the suspension of the writ. It was then provided that "during the present rebellion the President of the United States, whenever in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States or any part thereof . . ." (12 *Stat.* 755). As indicated by Randall (op. cit. *infra*) the use of the phrase "is authorized to suspend" made it uncertain whether the Congress was merely recognizing an already existing power of the President or was conferring a new power upon him.

Governmental records show that Merryman was finally released from military confinement and turned over to the civil authorities for prosecution, under an indictment for treason, in the United States District Court of Baltimore. He there entered a recognizance in the sum of $20,000 for his appearance before the Circuit Court for the District of Maryland to which the case was transferred. After being continued by order of the court no further action was taken in the case. *War of the Rebellion: Official Records of the Union and Confederate Armies,* Series II, Vol. 2, p. 226; Randall, *Constitutional Problems under Lincoln* (1926) 162 and note thereto.

[30] Cummings and McFarland relate the occurrence of a similar incident in 1818 in connection with the court martial trial of Dr. Barton when the order of the Court was again disregarded. *Federal Justice* (1937) 64n.

[31] As an illustration of a refusal by the Chief Executive to accept the decisions of the Supreme Court as final, it has been frequently stated that after Marshall rendered the decision in *Worcester v. Georgia,* 6 Peters 515 (U. S. 1832), in which it was held that the statutes of Georgia, under which certain missionaries had been convicted for acts done within the Georgian land of the Cherokee nation, could not be applied to acts done within the Indian territory, that Jackson said: "John Marshall has made his decision, now let him enforce it." 1 Greeley, *The American Conflict* (1864) 106; MacDonald, American Nation Series, *Jacksonian Democracy,* 177.

The more thorough commentators doubt whether Jackson ever made such a statement. See 1 Warren, *The Supreme Court in United States History* (1932) 759; Haines, *The American Doctrine of Judicial Supremacy* (1932) 331. Even in advance of the decision of the case, Jackson was accused by partisan newspapers of having refused to enforce any decision which might be rendered against the state of Georgia. It is interesting to note in this connection that William Wirt as counsel for the Cherokee Indians in the related case of *The Cherokee Nation v. Georgia,* 5 Peters 1 (U. S. 1831), had sought to impress upon the court, in his closing argument, that the fact that the judgment might not be enforced or that the President might refuse to perform "his duty" to enforce it should not deter the court from rendering a judgment.

It is possible that the historians who attribute the above-quoted

statement to Jackson have confused the matter with either Jackson's earlier refusal to take any steps to protect the rights of the Cherokees in their lands or his statement to the American Board of Foreign Missions that he had no authority to intervene in behalf of the missionaries prosecuted under the Georgia statute. It should be noted, however, that the former refusal was made prior to the commencement of any litigation and that the Worcester decision which Jackson is alleged to have stated he would not enforce had not yet been rendered when he made the latter. Mr. Warren (op. cit., Vol. I, pp. 761-2) advances the belief that as the controversy over the renewal of the Charter of the National Bank was contemporaneous with the Cherokee litigation, Jackson's doctrine, contained in his Veto Message upon the bank bill, that the decision of one branch of the government as to the constitutionality of a Federal statute ought not to control the co-ordinate branches, has been confused with what he said or might have said in regard to the decision in *Worcester v. Georgia.*

[82] This view was well-stated by Lincoln after the Supreme Court rendered its decision in *Dred Scott v. Sandford,* 19 Howard 393 (U. S. 1856): "All that I am doing," Lincoln said, "is refusing to obey (that decision) as a political rule. If I were in Congress and a vote should come up on a question whether slavery should be prohibited in a new territory, in spite of the Dred Scott decision I would vote that it should . . ." [*Lincoln and Douglas Debates* (Sparks Ed.) pp. 29-30]. Later in the debates, he stated that "We oppose the Dred Scott decision in a certain way . . . We do not propose that when Dred Scott has been decided to be a slave by the court, we, as a mob, will decide him to be free, . . . but we nevertheless do oppose that decision as a political rule which shall be binding on the voter to vote for nobody who thinks it wrong, which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision . . ." (Id., p. 299.)

[83] The fact that a second act is intended to take the place of one which has already been declared unconstitutional will naturally tend to prejudice the court against the validity of the second act. See *Hammer v. Dagenhart,* 247 U. S. 251 (1918) and *Bailey v. Drexel Furniture Co.,* 259 U. S. 20 (1922). Compare *Hill v. Wallace,* 259 U. S. 44 (1922) and *Board of Trade v. Olsen,* 262 U. S. 1 (1923).

[34] Act of February 25, 1862, Ch. 3; 12 *Stat.* 345; Act of July 11, 1862, Ch. 142; 12 *Stat.* 532; Act of March 3, 1863, Ch. 73; 12 *Stat.* 709.

[35] The Legal Tender Acts were declared unconstitutional in *Hepburn v. Griswold,* 8 Wallace 603 (U. S. 1869). After the change in the court personnel, such legislation was sustained as a war measure in the *Legal Tender Cases* (*Knox v. Lee; Parker v. Davis*), 12 Wallace 457 (U. S. 1870) and later as a peace measure in the *Legal Tender Case* (*Juillard v. Greenman*), 110 U. S. 421 (1884) (Act of May 31, 1878, Ch. 146; 20 *Stat.* 87).

For the effect that these decisions had upon national economic history a half century later, see *Norman v. B. & O. R. R.,* 294 U. S. 240 (1935) and *Holyoke Water Power Co. v. American Writing Paper Co.,* 300 U. S. 324 (1937) sustaining the abrogation of "gold clauses" contained in private contracts. See also Ribble, *State and National Power over Commerce* (1937) 110-117, 159-166 for two instances when a marked change in the interpretation of the Commerce Clause has followed a change in the membership of the Court. See also Corwin, *Standpoint in Constitutional Law,* 17 Boston L. Rev. (1937) 513.

[36] *Hammer v. Dagenhart,* 247 U. S. 251 (1918); Act of September 1, 1916, Ch. 432; 39 *Stat.* 675.

[37] *Champion v. Casey* (1792); *Brailsford v. Spalding* (1792); *Higginson v. Greenwood* (1793); *Van Horne's Lessee v. Dorrance,* 2 Dal. 304 (1795); *Anon. Case* (1791); *Anon. Case* (1799). See 1 Warren, *The Supreme Court in United States History* (1932), 63-69.

[38] See for example, the opposition of Pennsylvania which state during the short period of the six years from 1803 to 1809, in connection with three controversies [(1) *Huidekoper's Lessees v. Douglas,* 3 Cranch 1 (U. S. 1805); (2) *United States v. Nicholls,* 4 Yeates 251 (Pa. 1805); *Miller v. Nicholls,* 4 Wheaton 311 (U. S. 1819); (3) *The Sloop Active; United States v. Judge Peters,* 5 Cranch 115 (U. S. 1809)] challenged the authority of the Federal courts by legislative resolutions denying the jurisdiction of such courts, directing the ignoring of a pending writ of error, and directing the Governor "to protect the just rights of the State from any process issued out of any Federal court"; and by the use of the state militia to prevent a United States Marshal from enforcing a Federal decree. See 1 Warren, *The Supreme Court in United States History* (1932) 369-88.

Pennsylvania had already denied, in 1798, the right of an alien, conferred by the Act of September 24, 1789, Ch. 20, Sec. 12; 1 *Stat.* 73, 79, to remove a case in which he was defendant from a state court to a Federal court. *Respublica v. Cobbett,* 3 Dall. 467; 2 Yeates 352 (Pa. 1798); *Rush v. Cobbett,* 2 Yeates 275 (Pa. 1798). See also *Carey v. Cobbett,* 2 Yeates 277 (Pa. 1798) and Reporter's Note at 3 Dall. 467 (Pa.). These decisions were apparently never reviewed by the Federal courts. See *Gordon v. Longest,* 16 Pet. 79, 104 (U. S. 1842), where the Supreme Court, in condemning a state court for its denial of the right to remove, stated that "this is the first instance known to us, in which a State Court has refused to a party a right to remove his cause to the Circuit Court of the United States . . ."

The opposition of Virginia and Georgia went to the extreme of refusing to recognize decisions made by the Supreme Court in proceedings begun by writ of error to courts of these states. Virginia refused to recognize the decisions thus rendered in *Fairfax's Devisee v. Hunter's Lessee,* 7 Cranch 602 (U. S. 1813) and Georgia the decision of *Worcester v. Georgia,* 6 Peters 515 (U. S. 1832).

For a general summary of the opposition of the several states during this period, see Haines, *The American Doctrine of Judicial Supremacy* (1932) Ch. XI.

[39] Such defiance of the Federal writ of error was made by the courts of Georgia with the approval of the Legislature and the Governor of that State in the cases of Corn Tassel (1830) and of John Graves (1834).

[40] Act of September 24, 1789, Ch. 20; 1 *Stat.* 73, 85.

The Twenty-Fifth Section provided, "That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege

or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, the citation being signed by the chief justice, or judge or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court, and the proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute."

See Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 Harv. L. Rev. (1923) 53ff.

[41] 6 Cranch 87 (U. S. 1810).

[42] 7 Cranch 603 (U. S. 1813).

[43] 1 Wheat. 304 (U. S. 1816).

[44] *Hunter v. Martin,* 4 Munford 1 (Va. 1814).

[45] 6 Wheat. 264 (U. S. 1821).

[46] Va. Laws, 1821, p. 142, Resolution No. 2, February 19, 1821.

[47] The Commonwealth of Virginia won the case on the merits as the Court decided that the Federal statute was not to be construed as authorizing the sale of lottery tickets within Virginia.

[48] 4 Beveridge, *The Life of John Marshall* (1919) 542-3; 1 Warren, *The Supreme Court in United States History* (1932) 733-4.

An attempt was then made to procure a recognition of the rights of the Cherokees by a bill filed in the Supreme Court for an injunction to restrain the enforcement of the laws of Georgia within the Cherokee territory. The Governor of Georgia, under instructions of the State Legislature, ignored the subpoena which issued and no appearance was made by the state in the suit. However, the attempt was unsuccessful for the Supreme Court refused to take jurisdiction

of the bill because the Cherokee Nation was not a "foreign state" within the meaning of the clause of Article III, Section 2 of the Constitution, which declares that the judicial power of the United States shall extend to controversies "between a State, or the citizens thereof, and foreign states, citizens or subjects." The bill was also objectionable in that it presented a political rather than a judicial question to the extent that it called for the restraining of the Georgia legislature. *Cherokee Nation v. Ga.,* 5 Peters 1 (U. S. 1831).

[49] *Worcester v. Ga.,* 6 Peters 515 (U. S. 1832).

[50] 4 Beveridge, *The Life of John Marshall* (1919) 551; 1 Warren, *The Supreme Court in United States History* (1932) 768-9, 776-7 and note; Haines, *The American Doctrine of Judicial Supremacy* (1932) 329-32.

[51] Ga. Laws, 1834, p. 337, Resolution of November 15, 1834; 4 Beveridge, *The Life of John Marshall* (1919) 551-2 note; Warren, *Legislative and Judicial Attach on the Supreme Court—A History of the Twenty-Fifth Section of the Judiciary Act* (1913) 47 Am. L. Rev. 1, 174. See also *Ex parte Bushnell,* 9 Ohio St. 77, 150 (1859) and *Stunt v. The Steamboat Ohio,* 3 Ohio Decisions Reprints 362, 383 (1855).

[52] *In re Booth,* 3 Wisc. 1 (1854). Cf. *Ex parte Booth,* 3 Wisc. 145 (1854); *In re Booth,* 3 Wisc. 157 (1855). See Cummings and McFarland, *Federal Justice* (1937) 179-180.

[53] *Ableman v. Booth; United States v. Booth,* 18 How. 476, 479 (U. S. 1855); 21 How. 506 (U. S. 1858).

[54] *Ableman v. Booth,* 11 Wisc. 498 (1859).

[55] Wisc. Gen. Laws, 1859, p. 247, Joint Resolution No. 4, March 19, 1859.

[56] During this period immediately prior to the Civil War, the authority of the Supreme Court had also been defied in California [*Johnson v. Gordon,* 4 Cal. 368 (1854)] and Ohio [*Stunt v. The Steamboat Ohio,* 3 Ohio Decisions Reprints 362 (1855)] by a refusal of a state court to permit a review by the Supreme Court by writ of error. The decision rendered in the exercise of appellate jurisdiction over state courts by the Supreme Court in *Piqua Branch of the State Bank of Ohio v. Knoup,* 16 How. 369 (U. S. 1853) was not recognized by the Ohio state court until after a three years' delay. See *Piqua Bank v. Knoup,* 6 Ohio St. 342 (1856). A right to ignore the interpretations of the Constitution adopted by the

Supreme Court was asserted in *Padelford, Fay & Co. v. Savannah,* 14 Ga. 440 (1854) and *Ex parte Bushnell,* 9 Ohio State 77 (1859) although the decisions actually rendered by the state courts were not inconsistent therewith.

The conduct of the California judges in *Johnson v. Gordon, supra,* was condemned by the state legislature and made a misdemeanor and cause for impeachment. Stats. of Cal., Act of April 9, 1855, Ch. 73, p. 80.

See Warren, *Legislative and Judicial Attach on the Supreme Court—A History of the Twenty-Fifth Section of the Judiciary Act* (1913) 47 Am. L. Rev. 1, 161, for a full discussion of this opposition.

[57] The most summary survey of this opposition convinces one of the correctness of the conclusion stated by Mr. Warren that "throughout American history, devotion to State-Rights and opposition to the jurisdiction of the Federal Government and the Federal Judiciary, whether in the South or in the North, has been based, not so much on dogmatic, political theories or beliefs, as upon the particular economic, political or social legislation which the decisions of the Court happened to sustain or overthrow. No State and no section of the Union has found any difficulty in adopting or opposing the State-Rights theory, whenever its interest lay that way." (*The Supreme Court in United States History* (1932) Vol. I, p. 388.)

Thus Pennsylvania had condemned the resolutions of Virginia and Kentucky which had proclaimed the power of the several states to be the final judges of their status under the Federal system, yet in 1809, after Pennsylvania had found its sovereignty impaired by the Federal Judiciary in three separate controversies, it denied the function of the Supreme Court as ultimate arbiter of the Constitution and proposed that such an arbiter should be created by constitutional amendment. By 1831 these controversies had been evidently forgotten for the legislature of that state

"Resolved, . . . that the Constitution of these United States having proved itself, by near half a century's experience, a government beyond all others, capable of promoting national liberty and the general welfare, it must be preserved . . .

". . . that the Constitution of the United States authorizes, and experience sanctions, the twenty-fifth section of the Act of Congress, of September, one thousand seven hundred and eighty-nine,

and all others, empowering the federal judiciary to maintain the supreme laws . . ." (Pa. Laws, 1830-31, p. 505, Resolution of April 2, 1931.)

In its turn Virginia, after denying the supremacy of the Supreme Court in the Virginia Resolutions of 1798, answered the proposal of Pennsylvania to create a body to act as the final interpreter of the Constitution with the declaration that "a tribunal is already provided by the Constitution of the United States, to wit: the Supreme Court, more eminently qualified . . . to decide the disputes aforesaid in an enlightened and impartial manner than any other tribunal which could be created." (Va. Laws, 1810, p. 104, Resolution of January 26, 1810.)

The controversies with Virginia arising from the Fairfax land title litigation and *Cohens v. Va.,* 6 Wheat. 264 (U. S. 1821) caused an abandonment of this respect for the court and was largely responsible for Virginia's acceptance of Calhoun's doctrine of Nullification in a resolution of February 28, 1829:

". . . that the Constitution of the United States, being a Federative compact between sovereign states, in construing which no common arbiter is known, each state has the right to construe the compact for itself . . .

". . . that the Acts of Congress usually denominated the Tariff laws, passed avowedly for the protection of domestic manufactures, are not authorized by the plain construction, true intention and meaning of the Constitution . . ." (Virginia Laws, 1828-9, pp. 159, 169.)

This attitude was in turn abandoned by the time of the adoption of the Nullification Ordinance of South Carolina (1832). In 1823, the Supreme Court declared the Kentucky land-claimant laws to be unconstitutional. *Green v. Biddle,* 8 Wheat. 1 (U. S.). These laws expressed a strong local policy and the desire to prevent their constitutionality being considered by the Federal courts had led to frequent proposals to limit the jurisdiction of those courts so as to exclude cases raising that question from the Federal courts.

Although Kentucky in defiance of the supremacy of the Supreme Court now advanced the arguments against the Supreme Court made by Virginia in 1819 after the decision of *Cohens v. Virginia,* Virginia endorsed the decision of *Green v. Biddle.* The *Richmond Enquirer* condemned the Kentucky legislature for enunciating the same

doctrines which, through the pen of Roane, it had so strongly advocated only a few years earlier. This change was not unnoticed by Henry Clay who wrote to Francis Brooke of Virginia inquiring whether "Virginia (has not) exposed herself to the imputation of selfishness by the course of her conduct or that of many of her politicians? When, in the case of *Cohens v. Virginia,* her authority was alone concerned, she made the most strenuous efforts against the exercise of that power by the Supreme Court. But when the thunders of that Court were directed against poor Kentucky, in vain did she invoke Virginian aid. The Supreme Court, it was imagined, would decide on the side of supposed interest of Virginia. It has so decided; and, in effect, cripples the sovereign power of the State of Kentucky more than any other measure ever affected the independence of any State in the Union; and not a Virginia voice is heard against this decision." (Works of Henry Clay (1897), IV, Letter of August 28, 1823.)

See 1 Warren, *The Supreme Court in United States History* (1932) 374-89, 547-63, 637-42, 657-9; Haines, *The American Doctrine of Judicial Supremacy* (1932) 290-3, 297-8; Anderson, *Contemporary Opinion of the Virginia and Kentucky Resolutions,* 5 Am. Hist. Rev. (1899) 45, 236-7; McMaster, *A History of the People of the United States,* Vol. 5 (1900) pp. 403-6; Vol. 6 (1906) pp. 170-2.

[68] After the Civil War, a feeble attempt was made in 1872 by the Missouri Supreme Court to evade the supremacy of Federal review. In *Magwire v. Tyler,* 8 Wall. 650 (U. S. 1869), the United States Supreme Court reversed a judgment of the Missouri Supreme Court and directed that the latter court proceed "in conformity to the opinion of the court." This the State court refused to do by entering a second decree which conformed with its original reversed judgment. When a second writ of error was taken to the Supreme Court, the circumvention of the state court was condemned and avoided by the entry of a final judgment for the proper party. *Tyler v. Magwire,* 17 Wall. 253 (U. S. 1872).

The right of removal to a Federal court became established without any serious opposition. Where a proper petition and bond are seasonably filed to remove a proper case to the Federal courts, the state court no longer has jurisdiction to proceed with the case, even though it reaches the conclusion that the case is not removable [*Gor-*

don v. Longest, 16 Pet. 97 (U. S. 1842); *Insurance Co. v. Dunn,* 19 Wall. 214 (U. S. 1873); *Railroad Co. v. Koontz,* 104 U. S. 5 (1881); *Steamship Co. v. Tugman,* 106 U. S. 118 (1882); *Marshall v. Holmes,* 141 U. S. 589 (1891)]. The supremacy of the right to remove may then be vindicated either by an injunction issued by the Federal court to which the removal is sought to restrain the plaintiff in the state action from continuing the litigation in the state court or enforcing any judgment there rendered [*Madisonville Traction Co. v. St. Bernard Mining Co.,* 196 U. S. 239 (1905); *French v. Hay,* 22 Wall. 250 (U. S. 1874); *Dietsch v. Huidekoper,* 103 U. S. 494 (1880)], or by a judgment by the United States Supreme Court, in the event that the highest state court sustains the denial of the right to remove, directing the state court to recognize the defendant's right to remove and to vacate all decrees or judgments rendered subsequent to the filing of the petition [*Gordon v. Longest, supra; Railroad Co. v. Koontz, supra; Marshall v. Holmes, supra; Removal Cases,* 100 U. S. 457 (1879)].

[59] It is provided by the First Section of the Fourteenth Amendment that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[60] In conformity with the general rule that the Supreme Court can not render a decision in litigation which presents no actual "case" or "controversy", the rule has become established that a ruling upon the validity of a Federal statute will be avoided where the objection thereto is not raised by a party adversely affected by the operation of the statute or a decision thereof is not essential to the determination of an actual "case" or "controversy" pending before the court. *Blair v. United States,* 250 U. S. 273 (1919); *Massachusetts v. Mellon,* 262 U. S. 447 (1923); *Texas v. Interstate Commerce Commission,* 258 U. S. 158 (1922); *Old Colony Trust Co. v. Comm'r of Int. Rev.,* 279 U. S. 716 (1929); *Florida v. Mellon,* 273 U. S. 12 (1927); *New Jersey v. Sargent,* 269 U. S. 328 (1926). Jurisdiction to render a decision in litigation which does not present

an actual case or controversy cannot be constitutionally conferred upon the Supreme Court. *Muskrat v. United States,* 219 U. S. 346 (1911); *United States v. Evans,* 213 U. S. 297 (1909); *Keller v. Potomac Electric Power Co.,* 261 U. S. 428 (1923).

[61] Albertsworth, *Advisory Functions in the Federal Supreme Court,* 23 Geo. L. J. (1935) 643, 644; Cummings and McFarland (1937) 39-40.

[62] *U. S. Const.,* Art. I, Sec. 9, Cl. 4.

[63] The Supreme Court held in *Springer v. United States,* 102 U. S. 586 (1880) that the Civil War income tax was not a direct tax. In *Pollock v. Farmers Loan & Trust Co.,* 157 U. S. 429; 158 U. S. 601 (1895), the Court held that an income tax upon the income derived from property was a direct tax. This was tantamount to a prohibition against levying an income tax because of the inexpediency of enforcing an income tax apportioned among the states on the basis of their respective populations.

[64] 4 Wheat. (U. S.) 316.

[65] 9 Wheat. (U. S.) 1.

[66] Act of February 25, 1791, Ch. 10; 1 *Stat.* 191, entitled "an act to incorporate the subscribers to the Bank of the United States"; see also supplementary act of March 2, 1791, Ch. 11; 1 *Stat.* 196.

[67] Act of April 10, 1816, Ch. 64; 3 *Stat.* 266.

[68] Md. Laws, Act of February 11, 1818.

[69] *U. S. Const.* Art. I, Sec. 8, Cl. 18.

[70] 4 Wheat. (U. S.) at 421.

[71] 4 Wheat. (U. S.) at 407-9.

[72] "With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the State's inability to interfere has been regarded as established since *M'Culloch v. Maryland,* 4 Wheat. 316. The decision in that case was not put upon any consideration of degree but upon the entire absence of power on the part of the States to touch, in that way at least, the instrumentalities of the United States; 4 Wheat. 429, 430 . . . and that is the law today . . ." *Johnson v. Maryland,* 254 U. S. 51, 55-6 (1920); *Smith v. Kansas City Title & Trust Co.,* 255 U. S. 180 (1921); see also *Des Moines National Bank v. Fairweather,* 263 U. S. 103 (1923). Compare *Clallam County, Washington v. United States and United States Spruce Production Corporation,* 263 U. S. 341 (1923) and *City of New Brunswick v. United States* 276 U. S. 547 (1928) ex-

tending immunity from state taxation, to property held by corporations as instrumentalities of the United States.

[73] 9 Wheat. (U. S.) 1.

[74] *U. S. Const.*, Art. I, Sec. 8, Cl. 3.

[75] Act of September 1, 1789, Ch. 11; 1 *Stat.* 55, as amended by the Act of September 29, 1789, Ch. 22; 1 *Stat.* 94; superseded by Act of December 31, 1792, Ch. 1; 1 *Stat.* 287; superseded by Act of February 18, 1793, ch. 8; 1 *Stat.* 305.

[76] N. Y. Laws, p. 333, Ch. 225, Act of April 11, 1808. This act extended the franchise granted by several earlier acts. See *Ogden v. Gibbons*, 4 Johns. Ch. 150-1 (N. Y. 1819).

[77] Act of February 18, 1793, Ch. 8; 1 *Stat.* 305.

[78] *Ogden v. Gibbons*, 4 Johns. Ch. 150 (N. Y. 1819).

[79] *Gibbons v. Ogden*, 17 Johns. 488 (N. Y. 1820).

[80] See 1 Warren, *The Supreme Court in United States History* (1932) 597-621; 4 Beveridge, *The Life of John Marshall* (1919), Chap. VIII; Ribble, *State and National Power over Commerce* (1937) 21-29.

[81] It does not appear that the delegates to the Constitutional Convention had any clear concept or definition of commerce. As they were primarily interested in freeing trade from the many restrictions and tariffs which sister states as well as foreign nations imposed, there would seem to be some validity to the statement that "it is certain that (the commerce power) grew out of the abuse of the power by the importing states in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the states themselves, rather than as a power to be used for the positive purposes of the general government . . ." [James Madison to J. C. Cabell, February 13, 1829, 3 Farrand, *Records of the Federal Convention* (1911) 478].

[82] 9 Wheat. (U. S.) at 189-90. Professor Ribble makes the interesting observation that although Marshall had already held while on circuit that the power to regulate navigation was included in the power to regulate commerce [*The Brig Wilson v. United States*, Fed. Cas. No. 17,846 (C. C. D. Va. 1820)] neither court nor counsel made use of this decision in *Gibbons v. Ogden*. Ribble, *State and National Power over Commerce* (1937) 21 note 9. In the former case, Marshall had stated that "there is not, in the Constitution, one syllable on the subject of navigation. And yet, every power that pertains to

navigation has been uniformly exercised, and, in the opinion of all, been rightfully exercised by the Congress. From the adoption of the Constitution, till this time, the universal sense of America has been, that the word 'commerce', as used in that instrument, is to be considered a generic term, comprehending navigation, or, that a control over navigation is necessarily incidental to the power to regulate commerce."

[83] Compare the doctrines of (1) state regulations not intended to regulate interstate commerce but which do so indirectly [*Wilson v. The Blackbird Creek Marsh Co.*, 2 Pet. 245 (U. S. 1829)] (2) state regulations of local features of interstate commerce which are admittedly regulations of such commerce where there is no Federal statute [*Cooley v. Board of Wardens of the Port of Philadelphia*, 12 How. 299 (U. S. 1851)]; (3) state regulation of national features of interstate commerce enacted under the police power where necessary to protect against fraud or contagion [*Plumley v. Mass.*, 155 U. S. 461 (1894); *Hall v. Geiger-Jones Co.*, 242 U. S. 539 (1917)]; (4) state regulation of national features of interstate commerce in regard to harmless articles of commerce where the Congress is silent [*Bowman v. Chicago*, 125 U. S. 465 (1888); *Leisy v. Hardin*, 135 U. S. 100 (1890)]; (5) state regulation of national features of interstate commerce in regard to harmless articles of commerce where Congress has consented to the operation of the statute (a) where Congress could have made a similar regulation [*In re Rahrer*, 140 U. S. 545 (1891)] and (b) where Congress could not have made a similar regulation [*Whitfield v. Ohio*, 297 U. S. 431 (1936)]. But see the "justification" made by the court in *Kentucky Whip & Collar Co. v. Ill. Cent. R. R.*, 299 U. S. 334 (1937). Compare with cases cited under (4) and (5) the approach of the court in *Baldwin v. Seelig*, 294 U. S. 511 (1935).

[84] 19 How. 393 (U. S. 1857).

[85] Act of March 6, 1820, Ch. 22, Sec. 8; 3 *Stat.* 545, 548.

[86] *Ill. Const.* 1818, Art. VI, Sec. 1. Illinois was one of the states formed from the Northwest Territory. Slavery had been prohibited from such territory by the Northwest ordinance and the First Congress by Act of August 7, 1789, Ch. 8; 1 *Stat.* 50, had continued this prohibition. See also the Act of April 18, 1818, Ch. 67; 3 *Stat.* 428 and the Resolution of December 3, 1818; 3 *Stat.* 536 relating to the admission into the Union of the State of Illinois.

[87] *Scott v. Emerson,* 15 Mo. 576 (1852).

[88] 19 How. (U. S.) at 403.

[89] In holding that the stay in Illinois had not altered the status of Dred Scott in any way which would be recognized by Missouri, the court followed the decision of *Strader v. Graham,* 10 How. 82 (U. S. 1850), which had held that the status of a slave was to be determined by the law of the state from which he was taken and to which he was returned by his master, regardless of an intervening stay in a free state.

[90] Act of May 30, 1854, Ch. 59; 10 *Stat.* 277. Section 32 of this act (10 *Stat.* 289) repealed the Missouri Compromise Act and declared it to be "inoperative and void". The fact that the Compromise Act was no longer in force when the case of *Dred Scott v. Sandford* was decided by the Supreme Court did not, of course, make its decision moot unless the vehemence of the repealer could be given a retroactive effect.

[91] See 2 Warren, *The Supreme Court in United States History* (1932) Ch. XXVI.

[92] It is interesting to note in the opinion in the Dred Scott case what, interpreted in the light of later developments, may be regarded as an early declaration that due process was a guarantee of substantive right: "An Act of Congress which deprives a citizen of the United States of his liberty or property merely because he came himself or brought his property into a particular territory of the United States and who had committed no offense against the laws could hardly be dignified with the name due process of law . . ." [19 How. at 450 (U. S. 1857)]. *Cf. Reickert v. Felps,* 6 Wall. 160 (U. S. 1868). See Corwin, *The Doctrine of Due Process before the Civil War,* 24 Harv. L. Rev. (1911) 366, 475ff.

[93] 8 McMaster, *A History of the People of the United States* (1913) 282-3; 2 Warren, *The Supreme Court in United States History* (1932) 301-2 note.

[94] Mott, *Due Process of Law* (1926); Haines, *The Revival of Natural Law Concepts* (1930); *Judicial Review of Legislation in the United States and the Doctrine of Vested Rights and of Implied Limitations on Legislatures* (1924) 3 Tex. L. Rev. 1; J. A. Grant, *The Natural Law Background of Due Process,* 31 Col. L. Rev. (1931) 56; Howe, *The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment,* 18 Cal. L. Rev. (1930)

583; Pitts, *Evolution of the Due Process Clause in the Constitution,* 5 Kansas City L. Rev. (1936) 36; Corwin, *The Supreme Court and the Fourteenth Amendment,* 7 Mich. L. Rev. (1909) 643; *The Doctrine of Due Process of Law before the Civil War* (1911), 24 Harv. L. Rev. 366, 460; Hough, *Due Process of Law—Today* (1919), 32 Harv. L. Rev. 218, 224; Bird, *The Evolution of Due Process of Law in the Decisions of the United States Supreme Court* (1913), 13 Col. L. Rev. 37.

[95] The due process clause of the Fifth Amendment has been made the basis (either alone or in connection with some other provision or provisions of the Federal constitution) for declaring invalid 16 Federal statutes as follows: (1) DENIAL OF PROCEDURAL DUE PROCESS: (a) *Absence of a judicial hearing, Wong Wing v. U. S.,* 163 U. S. 228 (1896); *Lipke v. Lederer,* 259 U. S. 557 (1922); (b) *Indefiniteness of liability-imposing statute, U. S. v. L. Cohen Grocery Co.,* 255 U. S. 81 (1921); *Weeds v. U. S.,* 255 U. S. 109 (1921); *A. B. Small Co. v. American Sugar Refining Co.,* 267 U. S. 233 (1925); (c) *Unlawful delegation of legislative power, Carter v. Carter Coal Co.,* 298 U. S. 238 (1936) [see also *Schechter Poultry Corp. v. United States,* 295 U. S. 495 (1935); *Panama Refining Co. v. Ryan,* 293 U. S. 388 (1935)]; (2) DENIAL OF SUBSTANTIVE DUE PROCESS: (a) *Restriction upon freedom of contract, Adair v. United States,* 208 U. S. 161 (1908); *Adkins v. Children's Hospital,* 261 U. S. 525 (1923); (b) *Impairment of vested property interests, Choate v. Trapp,* 224 U. S. 665 (1912); *Lynch v. United States,* 292 U. S. 571 (1934); *Stewart v. Keyes,* 295 U. S. 403 (1935); *Louisville Joint Stock Land Bank v. Radford,* 295 U. S. 555 (1935); (c) *Retroactive taxation, Nichols v. Coolidge,* 274 U. S. 531 (1927); *Untermeyer v. Anderson,* 276 U. S. 440 (1928); (d) *Aribtrary classification, Heiner v. Donnan,* 285 U. S. 312 (1932); *Railroad Retirement Board v. Alton R. Co.,* 295 U. S. 330 (1935).

[96] The Supreme Court in 1934 said: "The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negatived many years ago. . . ." *Nebbia v. New York,* 291 U. S. 502, 532 (1934).

[97] *Borden's Farm Products Co., Inc. v. Baldwin,* 293 U. S. 194

(1934); *Borden's Farm Products Co., Inc. v. Ten Eyck,* 297 U. S. 251 (1936); *Mayflower Farms, Inc. v. Ten Eyck,* 297 U. S. 266 (1936). In determining whether price fixing is arbitrary it appears that the rules employed in utility rate making will not be followed. *Hegeman Farms Corp. v. Baldwin,* 293 U. S. 163 (1934). See also *Aetna Ins. Co. v. Hyde,* 275 U. S. 440 (1928). The delegation of authority to a state administrative agency to fix the prices to be charged does not present a Federal question. *Highland Farms Dairy, Inc. v. Agnew,* 300 U. S. 608 (1937). Compare with the concept that the subjecting of an individual to a regulation made by a body or person to whom the regulation-making authority has been improperly delegated is a denial of due process to the person regulated as well as a violation of the rule against delegation. *Panama Refining Co. v. Ryan,* 293 U. S. 388 (1935); see also *Schechter Poultry Corp. v. United States,* 295 U. S. 495 (1935).

[98] Under the old or legalistic concept of "public interest" the Supreme Court has sustained state price regulation outside of the public utility field in the case of storage elevator charges [*Munn v. Illinois,* 94 U. S. 113 (1877); *Budd v. New York,* 143 U. S. 517 (1892); *Brass v. Stoeser,* 153 U. S. 391 (1894)]; fire insurance rates [*German Alliance Insurance Co. v. Lewis,* 233 U. S. 389 (1914)]; and the amount of commission to be paid insurance agents by their employers [*O'Gorman and Young, Inc. v. Hartford Fire Insurance Co.,* 282 U. S. 251 (1931)]. The proprietary control of a state over its public roads justifies the exclusion from such roads of private carriers for hire who do not charge the same rates as the state commission requires common carriers to charge for substantially the same service where the purpose of such regulation is to lessen commercial traffic upon and to conserve the public roads. *Stephenson v. Binford,* 287 U. S. 251 (1932). Compare *Griffith v. Conn.,* 218 U. S. 563 (1910) sustaining the validity of a state statute imposing a maximum limitation upon interest charges as being "elementary" that such a regulation was within the police power of the state.

Regulation of prices has been held invalid where "public interest", as formerly defined, was not present as where the states sought to regulate the resale prices of theatre tickets [*Tyson & Bro. v. Banton,* 273 U. S. 418 (1927)]; fees charged by employment agencies [*Ribnik v. McBride,* 277 U. S. 350 (1928)]; price of gasolene [*Wil-*

liams v. Standard Oil Co., 278 U. S. 235 (1929)]; prohibit unfair trade practices by resale of dairy products at prices which discriminate against certain localities [*Fairmont Creamery Co. v. Minnesota*, 274 U. S. 1 (1927)]; or establish minimum wages [*Morehead v. New York ex rel. Tipaldo*, 298 U. S. 587 (1936); *Murphy v. Sardell*, 269 U. S. 530 (1925); *Donham v. West-Nelson Co.*, 273 U. S. 657 (1927)]; or require the compulsory arbitration of wage disputes [*Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522 (1923)].

The Federal government has been held to be without power to prescribe minimum wages for women employed within the District of Columbia [*Adkins v. Children's Hospital*, 261 U. S. 525 (1923) "over-ruled" by *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 (1937)]; or to provide for the establishment of wages or prices through industrial codes in industries not subject to Federal regulation [*Schechter Poultry Corp. v. U. S.*, 295 U. S. 495 (1935); *Carter v. Carter Coal Co.*, 298 U. S. 23 (1936)]; while the court has sustained Federal regulation of coal prices during war time [*Highland v. Russell Car & Snow Plow Co.*, 279 U. S. 253 (1929)]; and charges for services made by brokers or commission men at regional stockyards [*Tagg Bros. & Moorhead v. United States*, 280 U. S. 420 (1930)].

Although purporting to abide by the older concept of "public interest", the Supreme Court had, in several instances prior to the decision in *Nebbia v. New York, supra*, made concessions to reality by sustaining certain price regulations during the existence of an emergency: (a) regulations of rent by state [*Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170 (1921); *Levy Leasing Co. v. Siegel*, 258 U. S. 242 (1922)] and Federal government [*Block v. Hirsh*, 256 U. S. 135 (1921) (applicable to the District of Columbia)]; (b) regulation of wages of railroad employees as a temporary measure to avert a national strike [*Wilson v. New*, 243 U. S. 332 (1917)]. The right to regulate prices when predicated upon the existence of an emergency ceases when the emergency ceases. *Chastleton Corp. v. Rent Commission of District of Columbia*, 264 U. S. 543 (1924). See McAllister, *Price Control by Law in the United States: A Survey*, 4 Law and Contemp. Probs. (1937) 273.

[99] 291 U. S. 502 (1934).

[100] *Nebbia v. New York*, 291 U. S. 502 (1934); *Borden's Farm*

Products Co., Inc. v. Baldwin, 293 U. S. 194 (1934); *Borden's Farm Products Co., Inc. v. Ten Eyck,* 297 U. S. 251 (1936); *West Coast Hotel Co. v. Parrish,* 300 U. S. 379 (1937).

[101] A regulation by the states of prices at which commodities are to be sold must conform to the requirements of the interstate commerce clause as well as those of due process. *Baldwin v. Seelig,* 294 U. S. 511 (1935). The inability of a State to prohibit the local resale of commodities because of the price at which they were purchased in a sister State prevents effective local price control in most cases. *Cf. Henneford v. Silas Mason Co.,* 300 U. S. 577 (1937).

[102] 9 Wheat. 1 (U. S. 1824). See *supra* page 54 et seq.

[103] *Gloucester Ferry Co. v. Pa.,* 114 U. S. 196 (1885); *Pensacola Tel. Co. v. Western Union Tel. Co.,* 96 U. S. 1 (1877); *Public Utilities Com. of Rhode Island v. Attleboro Steam & Electric Co.,* 273 U. S. 83 (1927); *United States v. Simpson,* 252 U. S. 465 (1920); *United States v. Hill,* 248 U. S. 420 (1919); *Western Union Tel. Co. v. Speight,* 254 U. S. 17 (1920); *International Textbook Co. v. Pigg,* 217 U. S. 91 (1910); *Kelley v. Rhoads,* 188 U. S. 1 (1903); *Gooch v. U. S.,* 297 U. S. 124 (1936); *Thornton v. United States,* 271 U. S. 414 (1926). See also Ribble, *State and National Power over Commerce* (1937) Chaps. VII-IX.

[104] *Dahnke-Walker Milling Co. v. Bondurant,* 257 U. S. 282 (1921); *Lemke v. Farmers Grain Co.,* 258 U. S. 50 (1922); *Shafer v. Farmers Grain Co.,* 268 U. S. 189 (1925); *Bowman v. Chicago R. Co.,* 125 U. S. 465 (1888); *Leisy v. Hardin,* 135 U. S. 100 (1890); but compare *Plumley v. Mass.,* 155 U. S. 461 (1894); *Hartford Acc. & Ind. Co. v. Ill.,* 298 U. S. 155 (1936).

[105] *Coe v. Errol,* 116 U. S. 517 (1886); *Minnesota v. Blasius,* 290 U. S. 1 (1933); *Sonneborn v. Cureton,* 262 U. S. 506 (1923); *Woodruff v. Parham,* 8 Wall. 123 (1868); *Henneford v. Silas Mason Co.,* 300 U. S. 577 (1937).

[106] As to the power of Congress to remove the immunity from application of the state police power possessed by goods which have come into the state through interstate commerce and are still unsold and in the unbroken original package, see cases cited subsection (5) of note 83 *supra.*

[107] See *United States v. Simpson,* 252 U. S. 465 (1920); *United States v. Hill,* 248 U. S. 420 (1919); *Thornton v. United States,*

271 U. S. 414 (1926); *Wilson v. United States,* 232 U. S. 563 (1914); *Caminetti v. United States,* 242 U. S. 470 (1917).

[108] *Paul v. Virginia,* 8 Wall. 168 (1869); *New York Life Insurance Co. v. Deer Lodge County,* 231 U. S. 495 (1913); *Moore v. N. Y. Cotton Exchange,* 270 U. S. 593, 604 (1926).

[109] *National Labor Relations Board v. Jones & Laughlin Steel Corp.,* 301 U. S. 1 (1937); *National Labor Relations Board v. Fruehauf Trailer Co.,* 301 U. S. 49 (1937); *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.,* 301 U. S. 58 (1937); *Associated Press v. National Labor Relations Board,* 301 U. S. 103 (1937); *Washington, Virginia and Maryland Coach Co. v. National Labor Relations Board,* 301 U. S. 142 (1937).

[110] Act of July 5, 1935, Ch. 372; 49 *Stat.* 449.

[111] 298 U. S. 238 (1936). See also *Champlain Refining Co. v. Corporation Commission,* 286 U. S. 210 (1932); *Utah Power and Light Co. v. Pfost,* 286 U. S. 165 (1932).

[112] The proportion of the product which in the normal course of business is transported to other States, which appears so important in the National Labor Relations Board decisions was not mentioned by the majority opinion. Reference was made to it by Cardozo, J., in his dissenting opinion, 298 U. S. at 329.

[113] *Dahnke-Walker Milling Co. v. Bondurant,* 257 U. S. 282 (1921).

[114] *Stafford v. Wallace,* 258 U. S. 495 (1922); *Chicago Board of Trade v. Olsen,* 262 U. S. 1 (1923); *Tagg Bros. & Moorhead v. United States,* 280 U. S. 420 (1930). See also *Board of Trade v. Wallace,* 67 F. (2d) 402, 407 (C. C. A. 7th, 1933) certiorari denied 291 U. S. 680 (1934); *Bartlett Frazier Co. v. Hyde,* 65 F. (2d) 350 (C. C. A. 7th, 1933) certiorari denied 290 U. S. 654 (1933). In the absence of such a relation to interstate commerce, a sale is a local transaction not subject to Federal regulation. *United States v. DeWitt,* 9 Wall. 41 (U. S. 1870). Where such a relation exists between local sales and interstate commerce as to sustain the constitutionality of Federal regulation the states have no power to regulate such sales. *Lemke v. Farmers' Grain Co.,* 258 U. S. 50 (1922); *Shafer v. Farmers' Grain Co.,* 268 U. S. 189 (1925).

[115] Section 10 (a) of the Act empowers the Board "to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce." Commerce is defined by Section 2(6)

as "trade, traffic, commerce, transportation, or communication among the several states . . ."; "affecting commerce" is defined by section 2(7) as anything "burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

In discussing these sections Chief Justice Hughes said: "There can be no question that the commerce thus contemplated by the Act . . . is interstate . . . commerce in the constitutional sense. . . . (It) does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds . . ." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. at 31 (1937).

[116] *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937); *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.*, 301 U. S. 58 (1937); *National Labor Relations Board v. Fruehauf Trailer Co.*, 301 U. S. 49 (1937).

[117] *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937).

[118] In the case of the *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937), the employer was the fourth largest producer of steel and pig iron in the United States, manufacturing the steel and iron in two plants in Pennsylvania, obtaining its materials and distributing its products through nineteen subsidiaries, owning or controlling mines in Michigan and Minnesota, operating ore steamships on the Great Lakes and interconnecting rail and barge lines, working coal and limestone mines and quarries and producing fabricated steel in a New York and Louisiana plant. The protection of the Act was sought for employees in one of the Pennsylvania plants, seventy-five per cent. of whose products were exported in the course of business and distributed in various states through twenty sales offices and in Canada by a wholly owned subsidiary.

The employer in the case of the *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.*, 301 U. S. 58 (1937), was a

clothing manufacturer whose plant was located at Richmond, Virginia. 99.57% of its materials were purchased in other states, while 82.8% of the finished clothing was sold to customers outside the state of production, 75% of the raw materials were purchased in New York, where approximately one-fifth of the manufacturer's sales of completed products were made through the manufacturer's New York distributors.

In the case of the *National Labor Relations Board v. Fruehauf Trailer Co.*, 301 U. S. 49 (1937), the employer was engaged in the manufacture of commercial trailers, trailer parts and accessories in the largest trailer plant in the United States. Over one-half of its raw materials were brought in from other states, while 80% of its products were sold outside of the state of production through the agency of thirty-one branch sales offices in twelve different states and by a wholly owned subsidiary in Canada. The company also furnished to its customers a sales service to determine the customers' trailer needs.

[119] 301 U. S. 1 (1937).

[120] 301 U. S. at 42 (1937).

[121] The Court has not purported to establish any rule by which future cases may be decided. "Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise. . . ." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. at 32 (1937). Prophesy as to the future is also made difficult by the efforts of the Court to reconcile its earlier decisions with the instant cases. See the discussion of *Schechter Poultry Corp. v. United States*, 295 U S. 495 (1935) and *Carter v. Carter Coal Co.*, 298 U. S. 23 (1936) in the case of *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. at 40-41 (1937) and of the case of *Adair v. United States*, 208 U. S. 161 (1908) in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. at 45 (1937). See also *Associated Press v. National Labor Relations Board*, 301 U. S. at 129 (1937). See further Corwin, *Standpoint in Constitutional Law*, 17 Boston L. Rev. (1937) 513, 529ff; Mueller, *Businesses Subject to the National Labor Relations Act*, 35 Mich. L. Rev. (1937) 1286.

[122] *U. S. Const.*, Art. I, Sec. 8, Cl. 7.

[123] *U. S. Const.*, Art. I, Sec. 8, Cl. 13.

[124] See *United States v. Butler*, 297 U. S. 1, 66 (1936); *Helvering v. Davis*, 57 Sup. Ct. 904, 908 (1937). See also Grant, *Commerce, Production, and the Fiscal Powers of Congress*, 44 Yale L. J. (1936) 751, 991.

[125] In *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288 (1936), the Supreme Court sustained the validity of the sale to a private corporation by the Tennessee Valley Authority of the surplus electrical energy generated at the Wilson Dam. This conclusion was reached by first considering the maintenance of the hydro-electric plants operated in connection with the Wilson Dam as a lawful exercise of the war power for "'the maintenance of said properties in operating condition and the assurance of an abundant supply of electric energy in the event of war, constitute national defense assets.'" (297 U. S. at 328.) The fact that the dam and plants had been originally constructed pursuant to the National Defense Act of January 3, 1917, Ch. 134, Sec. 124, 39 Stat. 215, gave some color to this argument although there was no intention to manufacture war materials in time of peace. The conclusion that the operation of the dam was within the constitutional power of Congress was further supported by the fact that the presence of the dam improved navigation on the river on which it was located although the river was still "not adequately improved for commercial navigation, and traffic (was) small . . ." (297 U. S. at 329.)

The operation of the dam and hydro-electric plants being lawful, the ability of Congress to authorize the sale of the surplus electrical energy rested upon its power to dispose of property belonging to the United States. The Federal government owning such surplus power, it lay "in the discretion of the Congress, acting in the public interest, to determine of how much of the property it shall dispose," nor was there any limitation that the electrical energy could be disposed of "only to the extent that it (was) a surplus necessarily created in the course of making munitions of war or operating the works for navigation purposes . . ." (297 U. S. at 335, 336.)

See also *Arizona v. California*, 283 U. S. 423 (1931); *United States v. Chandler-Dunbar Co.*, 229 U. S. 53 (1913). An analogy may be found in the case of the Federal banks which provide ordinary banking facilities for private persons in addition to their governmental functions. In *Smith v. Kansas City Title & Trust Co.*,

255 U. S. 180 (1921) it was held that the validity of a statute creating Federal Land Banks and Joint Stock Land Banks was not impaired by the slight use the government actually made of such institutions. The court refused to consider whether "the attempt to create these federal agencies, and to make (them) fiscal agents and public depositaries of the Government (was) but a pretext . . . (for) it is not the province of the judicial branch . . . to question (the) motives (of Congress) . . ." (255 U. S. at 210.)

[120] The Shipping Board controlled the Fleet Corporation (the stock of which was held entirely by the United States with the exception of the shares required to be held by the Trustees of the Fleet Corporation) and early in the war delegated to the Corporation the performance of most of its functions. At the close of the war, the Board and the Corporation, in addition to furtherance of the policy of promoting a merchant marine, had the task of disposing of the vessels acquired by the United States during the World War and which were no longer needed. To further the sale of such vessels to private purchasers, the Board and the Corporation instead of leaving the vessels stand idle, operated them as a merchant marine until their final disposition in 1929. See Smith and Betters, *The United States Shipping Board* (1931), Service Monographs of the United States Government, No. 63, Chap. I. The Shipping Board has been abolished by Executive Order No. 6166, June 10, 1933, and its powers transferred to the Department of Commerce.

[127] *Cf. Johnson v. Maryland,* 254 U. S. 51 (1920) (Driver of United States Mail truck cannot be required to obtain state driver's license). See also *Clallam County v. United States,* 263 U. S. 341 (1923); *New Brunswick v. United States,* 276 U. S. 547 (1928); *New York ex rel. Rogers v. Graves,* 299 U. S. 401 (1937).

[128] Compare the problem presented when a state which would otherwise be exempt from Federal taxation engages in an enterprise generally considered as private in character. It is held that a state is liable in such cases for Federal taxes to the same extent as a private person for a "State cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend. The fact that the State has power to undertake such enter-

prises, and that they are undertaken for what the State conceives to be the public benefit, does not establish immunity . . ." *Helvering v. Powers,* 293 U. S. 214, 225 (1934); *South Carolina v. United States,* 199 U. S. 437 (1905); *Ohio v. Helvering,* 292 U. S. 360 (1934). See also *Brush v. Commissioner,* 300 U. S. 352 (1937).

[120] Neither the guarantee by the Fourteenth Amendment of due process or equal protection of the laws protects a private enterprize from the competition of a municipally operated plant or enterprize, even though the private enterprize pays taxes in common with other taxpayers to support the municipal enterprize [*Madera Waterworks v. Madera,* 228 U. S. 454 (1913); *Greene v. Frazier,* 253 U. S. 233 (1920); *Jones v. Portland,* 245 U. S. 217 (1917); *Standard Oil Co. v. Lincoln,* 114 Neb. 243; 207 N. W. 172; 208 N. W. 962 (1926) affirmed per curiam 275 U. S. 503 (1927); see also *Denver v. New York Trust Co.,* 229 U. S. 123 (1913)]; pays a tax to support the municipal enterprize which is only levied upon other private enterprizes of the same type as the private and municipal enterprize [*Puget Sound Power & Light Co. v. Seattle,* 291 U. S. 619 (1934)]; or that the rates of the private enterprize are subject to state regulation while the rates charged by the municipality are exempt from regulation [*Springfield Gas & Electric Co. v. Springfield,* 257 U. S. 66 (1921); *Puget Sound Power & Light Co. v. Seattle, supra*].

Limitations upon the extent to which a municipality may engage in an enterprize and compete with privately owned enterprizes are of course found in the obligation of contracts clause where the private enterprize has been granted a franchise expressly prohibiting the municipality from competing with it as well as in the limitation, generally implied, that a municipality can only use its tax monies to engage in a "public purpose" activity, though, of course, "public purpose" is a varying concept.

In regard to competition by the Federal government with private enterprizes the following statement of the Supreme Court is significant: "As to the mere sale of surplus energy, nothing need be added to what we have said as to the constitutional authority to dispose. The Government could lease or sell and fix the terms . . ." *Ashwander v. Tennessee Valley Authority,* 297 U. S. 288, 388 (1935). See also *Greenwood County v. Duke Power Co.,* 81 F. (2d) 986 (C. C. A. 4th, 1936); *Arkansas-Missouri Power Co. v. City of Ken-*

tucky, Mo., 78 F. (2d) 911 (C. C. A. 8th, 1935). Compare *Hollis v. Kutz,* 255 U. S. 452 (1921). See also Albertsworth, *Constitutional Issues of the Federal Power Program,* 29 Ill. L. Rev. (1935) 833ff; Welch, *The Validity of Loans and Grants to Municipalities for Construction of Power Plants,* 25 Geo. L. J. (1937) 607ff.